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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

~~No. 399.~~ 103

THE BANK OF BRITISH NORTH AMERICA, PLAINTIFF IN ERROR,

vs.

WILLIAM B. COOPER, JR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 14, 1887.

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INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Præcipe for summons	3	2
Summons	5	2
Complaint	7	3
Notice of appearance for defendant	13	5
Answer	15	6
Minutes of trial	23	9
Judgment	25	9
Opinion of Judge Coxe on motion for new trial	27	10
Order denying motion for new trial	33	13
Bill of exceptions	35	13
Testimony of Wm. B. Cooper, Jr.	36	14
Plaintiff's Exhibit No. 2—Letter Cooper to McTavish, March 24, 1884	41	16
3—Letter Stikeman to Cooper, March 24, 1884	41	16
4—Letter Cooper to the bank, April 24, 1884	42	17
5—Letter Stikeman to Cooper, April 25, 1884	44	18
6—Letter McTavish to Cooper, May 20, 1884	45	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 3, 1890.

	Original.	Print.
Plaintiff's Exhibit No. 1—Receipt from agents to Cooper, February 26, 1884	46	19
8—Letter Cooper to agents, June 7, 1884	47	19
7—Letter McTavish to Cooper, June 9, 1884	48	20
9—Bill of exchange, Dec. 14, 1883	57	24
10—Protest of bill (not set out)	58	25
Testimony of Duncan A. McTavish	59	26
Plaintiff's Exhibit No. 11—Extract from books of bank	60	26
Testimony of Henry Stikeman	62	27
Plaintiff's Exhibit No. 13—Order for cable transfer	63	27
Defendant's Exhibit A[1]—Order for cable transfer	64	28
Testimony of Chas. P. Walker	65	28
John M. Martin	72	32
Robert Davidson	79	36
Exhibit A—Letter of Wallis to Bank of Scotland, February 27, 1884	81	37
B—Account Martin, Turner & Co. with bank of Scotland	82	37
Testimony of Wm. B. Cooper, Jr.	83	37
Duncan A. McTavish	84	38
Thomas H. Campbell	99	46
Wm. B. Cooper, Jr.	104	48
Defendant's requests	105	48
Charge to the jury	107	49
Assignment of errors	118	54
Bond	120	55
Citation	122	55

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between William B. Cooper, Junior, as plaintiff, and The Bank of British North America, as defendant, a manifest error hath happened, to the great damage of the said The Bank of British North America, defendant, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 25th day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

All. July 25, 1887.
E. H. LACOMBE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and twenty-three, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Bank of British North America, plaintiff in error, against William B. Cooper, Junior, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of August, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] U. S. Supreme Court. The Bank of British North America, pl'tiff in error, ag'st William B. Cooper, Jr., def't in error. Writ of error. Nash & Kingsford, att'ys for pl't'ff in error, 67 Wall street. 25, p'd. Due service of a copy of the within writ is hereby admitted July 26, '87. Platt & Bowers, att'ys for defendant. U. S. circuit court, Jul- 26, 1887. Timothy Griffith, clerk.

3 Circuit Court of the United States for the Southern District of New York.

WILLIAM B. COOPER, Junior, Plaintiff,
vs.
THE BANK OF BRITISH NORTH AMERICA, Defendant.

Timothy Griffith, clerk circuit court U. S., southern district of New York:

You will please issue a summons to the defendant, The Bank of British North America, in the above-entitled action.

PLATT AND BOWERS,
Attorneys for Plaintiffs.

Office and post-office address, 54 William St., New York.

4 [Endorsed:] Circuit court U. S., southern dist. of N. Y. Wm. B. Cooper, Jr., *vs.* The Bank of British North America. Praecipe for summons. Platt and Bowers, att'ys for pl'ff. U. S. circuit court. Filed July 11, 1884. Timothy Griffith, clerk.

5 United States Circuit Court for the Southern District of New York.

WILLIAM B. COOPER, Jr., Plaintiff,
vs.
THE BANK OF BRITISH NORTH AMERICA, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

[L. S.] Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 17th day of July, in the year one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

PLATT AND BOWERS,
Plaintiff's Attorneys.

Office and post-office address, 54 William St., N. Y. city, New York.

6 [Endorsed:] United States circuit court, southern district of New York. Wm. B. Cooper, Junior, *vs.* The Bank of British North America. Summons. Platt and Bowers, pl'ff's att'ys. To the defendant within named: Take notice that upon default judgment will be taken for the sum of — dollars in money, with interest from the — ——, 18—, besides costs. —— ——, pl'ff's att'y.

7 Circuit Court of the United States of America, in the Second Circuit, for the Southern District of New York.

WILLIAM B. COOPER, Junior, Plaintiff,
against
THE BANK OF BRITISH NORTH AMERICA, Defendant.

William B. Cooper, Junior, a citizen of the United States and a resident of the State of New York and within the said district, appearing in this suit by Platt and Bowers as his attorneys, by this his complaint complains of the Bank of British North America, which is an alien, viz., a corporation duly created by and existing under the laws of the Dominion of Canada, first, for that whereas that heretofore and on the twenty-sixth day of February, in the year eighteen hundred and eighty-four, and at the city of New York, said defendant, in consideration that the said plaintiff would pay to it the sum of twenty-four thousand five hundred and twenty-seven dollars, undertook, promised, and agreed with the said plaintiff to remit for him and to pay over to the firm of Martin, Turner and Co., at Glasgow, Scotland, Kingdom of Great Britain and Ireland, the sum of five thousand pounds sterling money of said kingdom.

8 That this plaintiff thereupon, relying on the aid, promise, and obligation of the said defendant, paid unto it the said sum of twenty-four thousand five hundred and twenty-seven dollars; but the said defendant, not regarding its aforesaid promise and undertaking in that behalf, did not remit and pay over unto the said firm of Martin, Turner and Co., at Glasgow aforesaid, the said sum of five thousand pounds sterling money as aforesaid, but utterly neglected and refused to pay over the same to the said firm at the place aforesaid, to the damage of this plaintiff in the sum of twenty-four thousand five hundred and twenty-seven dollars.

Second. And the plaintiff, for a further or other cause of action, complains that whereas the plaintiff, having his place of business at

the city of New York, and the defendant likewise having a place of business at the city of New York, and also at the city of London, England, which said several places of business existed on the twenty-sixth day of February last and still continue to exist; and whereas on the said twenty-sixth day of February, eighteen hundred and eighty-four, the said plaintiff employed the defendant in the usual and ordinary course of its business as his agent in the following, to wit:

The plaintiff, being desirous of remitting the sum of five thousand pounds sterling, to be paid to the firm of Martin, Turner and Co., at the city of Glasgow, in Scotland, the said remittance to be used by them in paying a draft or bill of exchange for said
9 sum which had been drawn by the plaintiff on the said firm, and which he had promised and agreed to provide funds to pay at its maturity, and which did mature on the twenty-eighth day of Feb-u-ry, eighteen hundred and eighty-four, applied to defendant in this action, at his office, at the city of New York, and employed it as his agent to remit, at his special instance, employment, and request, the said sum of money by telegraph to itself at its office at the city of London, to be by said defendant, from said office at the city of London, paid by draft to be sent by mail to the firm of Martin, Turner and Co., at Glasgow, Scotland, with notification that the same was so remitted for account of this plaintiff; and the said defendant accepted the employment in that regard and was duly paid for its said services in accepting such agency and making such remittance the sum of twenty-four thousand five hundred and twenty-seven dollars as and for its charges, commissions, and compensation in the matter, and in consideration of the payment to it of the said sum of twenty-four thousand and five hundred and twenty-seven dollars said defendant undertook and agreed to and with the plaintiff to remit by telegraph to itself at London, and by mail from London to Glasgow, to the firm of Martin, Turner and Co., at Glasgow, Scotland, the sum of five thousand pounds sterling, with the notification that the same was so remitted for account of this plaintiff.

10 And the plaintiff, further complaining, shows that the said defendant, in violation of its duty and agency and in violation of the employment it had accepted, did not cause the said sum of five thousand pounds sterling to be remitted by mail to the firm of Martin, Turner and Co., at Glasgow, Scotland, nor has it ever remitted or paid the said sum to the said firm of Martin, Turner and Co., at Glasgow, Scotland.

And the plaintiff, further complaining, shows that the defendant, in violation of its duty and in disregard of its agency and promise, instead of remitting the said sum of five thousand pounds sterling from its London house to the said firm of Martin, Turner and Co., at Glasgow, Scotland, by mail and without knowledge on the part of this plaintiff, and on the twenty-seventh day of February, eighteen hundred and eighty-four, at London, England, paid the said sum of five thousand pounds sterling to the Bank of Scotland, which bank appropriated the same to its own benefit, and by reason of

such misdirection and wrongful payment of said sum the same became wholly lost to this plaintiff, and he was obliged thereafter otherwise to provide funds to pay the said draft or bill of exchange of five thousand pounds, for the payment of which this money had been remitted, to his damage twenty-four thousand five hundred and twenty-seven dollars.

And the said plaintiff further shows that the said defendant,
11 though duly requested so to do, has refused to make good to him his loss on the premises or to return to him the money that he paid to them.

Wherefore this plaintiff prays judgment against the defendant in the sum of twenty-four thousand five hundred and twenty-seven dollars, with interest on said sum from the twenty-sixth day of February, eighteen hundred and eighty-four, together with the costs of this action.

PLATT AND BOWERS,
Attorneys for Plaintiff, 54 William St., New York.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } *ss:*

George C. Wilde, being duly sworn, deposes and says that he is the agent and attorney-in-fact of William B. Cooper, Junior, the above-named plaintiff; that the foregoing complaint is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that the reason this verification is not made by said plaintiff is that he is not in the county of New York, where deponent resides, but is in Europe, and all the material allegations of said complaint are within the personal knowledge of deponent.

GEORGE C. WILDE.

Sworn to before me this 16th day of July, 1884.

THOMAS F. KEATING,
Notary Public, N. Y. Co.

12 [Endorsed:] Circuit court of the United States, S. D. of New York. William B. Cooper, Jr., plaintiff, *vs.* The Bank of British North America, defendant. Complaint. Platt and Bowers, pl'ff's att'ys, 54 William St., N. Y. U. S. circuit court. Filed Jul. 17, 1884. Timothy Griffith, clerk.

13 United States Circuit Court for the Southern District of New York.

WILLIAM B. COOPER, Jr., Plaintiff,
against
THE BANK OF BRITISH NORTH AMERICA, Defendant. } Notice of Appearance.

SIRS: Please to take notice that the defendant, The Bank of British North America, appears in this action, and that we are retained as

attorneys for it therein, and demand that all papers in this action be served on us at our office, number 51 William St., New York.

July 18th, 1884.

Yours, &c.,

NASH & KINGSFORD,
Attorneys for Defendant.

Office, No. 51 William St., New York; post-office address, 51 William St., New York.

To Platt and Bowers, Esq.-, plaintiff's att'ys, 54 William St., New York.

14 [Endorsed:] United States circuit court, southern district of New York. William B. Cooper, Jr., ag'st The Bank of British North America. (Copy.) Notice of appearance of defendant. Nash and Kingsford, attorneys for def't. To Platt and Bowers, plaintiff's attorneys, 54 William St., city. U. S. circuit court. Filed Jul. 19, 1884. Timothy Griffith, clerk.

15 Circuit Court of the United States, in the Second Circuit, for the Southern District of New York.

WILLIAM B. COOPER, JR.,
against
THE BANK OF BRITISH NORTH AMERICA.

The defendant, The Bank of British North America, by Nash and Kingsford, its attorneys, answers the complaint of William B. Cooper, Jr., as follows:

First. It denies that it is an alien or a corporation created under the laws of the Dominion of Canada, but admits that it is a corporation created and existing under the laws of Great Britain, its head office being in the city of London, England.

Second. For a further answer to the complaint the defendant alleges that the matters stated in the complaint do not relate to two causes of action, but relate to one and the same transaction, the facts in respect to which are as follows:

On the 28th day of February, 1884, the plaintiff applied to the agents of the defendants, in the city of New York, to purchase a "cable transfer"—that is, a draft or order upon the defendant in London, England; through the direction of its agents in New York communicated by ocean telegraph cable, and the rate therefor
16 being satisfactory, the plaintiff gave an order to transfer by cable to Martin, Turner and Co., of Glasgow, the amount of five thousand pounds sterling, and the following statement of the transaction, being a printed blank filled up in writing, the words underscored being in writing and the residue in print, was then and there handed to the plaintiff and taken away by him:

"NEW YORK, *26th February*, 1884.

"Mr. *W. B. Cooper, Jr.*, Dr. to the agents Bank of British North America, 52 Wall street, for cable transfer on the Bank of British North America, London, in favor of *Martin, Turner and Co., Glasgow:*

"*£5,000 @ 4.90½*	*24,525*
"Cost of cable	*2*
	24,527

(In red print:) This transfer is sold without responsibility to the Bank of British North America or their correspondents for errors or delay in transmission."

And the plaintiff paid to said agents the sum of twenty-four thousand five hundred and twenty-five ($24,525) dollars as the cost of the said five thousand pounds sterling and two ($2) dollars as the cost of the telegraph dispatch.

17 The plaintiff had for more than a year prior to said transaction on the 26th day of February, 1884, been accustomed to make similar transactions through the agents of the defendants in the city of New York, and had arranged with said agents, in order to economize the cost of telegraphing and solely for his own benefit, a single word duly registered on the 2nd day of September, 1882, as standing for "Martin, Turner and Co., Glasgow, ac., W. B. Cooper, Jr., ac.," meaning "on account of," and said single word was used by said agents, as plaintiff well knew, in transmitting said order.

No special directions as to the purpose of such cable transfer were given to defendant's agents by the plaintiff on the said 28th day of February, 1884, or at any time, nor any directions whatever other than an order for a cable transfer to London for Martin, Turner and Co., and no such special directions could, as plaintiff well knew, be transmitted for the two dollars, the cost of the transfer with the single word as above stated, charged in the above-recited statement worded said agents, nor this defendant know of any reason, in the relations between plaintiff and said Martin, Turner & Co. or otherwise, why the said order could not be fulfilled by the payment to said Martin, Turner and Co. of the amount called for in any manner satisfactory to them as payees.

18 And this defendant alleges upon information and belief that in the course of previous transactions of a similar character with Martin, Turner and Co. by cable transfer from the plaintiff said Martin, Turner and Co., whose place of business was in Glasgow, Scotland, but who had, as plaintiff well knew, business transactions in London, and who kept a bank account with the Bank of Scotland, had as early as July, 1883, given this defendant written instructions as follows:

"In the future please pay all transfers of monies from Wm. Cooper, New York (meaning the plaintiff), to the credit of our account with the Bank of Scotland, Lothbury, London, kindly advis-

ing us of same by telegram when paid, and kindly do so until advised to the contrary."

The said instructions had never been recalled or modified when this defendant received the cable transfer above stated on the 27 day of February, 1884, in London, England, and thereupon this defendant paid five thousand pounds sterling to the said Bank of Scotland for the credit of Martin, Turner and Co., Glasgow, the receipt of which was acknowledged the same day by the said bank for credit of Messrs. Martin, Turner and Co., Glasgow, and on the same day this defendant telegraphed from London to said Martin, Turner and Co., Glasgow, as follows:

"We are paying five thousand pounds to your credit with Bank
— Scotland here from New York on account of Cooper;" the receipt
of which telegram was acknowledged by said Martin, Turner
19 and Co. by letter, also of the same date, and the action of this
defendant approved and confirmed.

This defendant is advised and alleges that its said action was a due and proper payment of the said cable transfer and a due and proper execution of the order given to defendant's agents in New York.

This defendant denies that it undertook, as in the complaint herein alleged, to pay Martin, Turner and Co., at Glasgow, or otherwise than as hereinabove stated.

It denies that the plaintiff employed it as his agent to remit to Martin, Turner and Co., at Glasgow, the sum of five thousand pounds sterling by mail or otherwise, or employed it in any manner otherwise than as hereinbefore alleged and in the hereinbefore-quoted statement expressed.

This defendant was never advised by its said agents or otherwise of the desire or purpose of plaintiff in respect to such remittance and has no knowledge or information sufficient to form a belief in respect to such desire or purpose; but this defendant avers, upon information and belief, that on the said 27th day of February, 1884, the said sum of five thousand pounds sterling was, in fact, paid to the said Martin, Turner and Co., and was at their disposition for any purpose to which, under their arrangement with plaintiff, he had a
right to direct its application.

20 This deponent admits that plaintiff has demanded the payment to him of the sum of twenty-four thousand five hundred and twenty-seven ($24,527) dollars, as claimed in the complaint, and that defendant has refused to make such payment.

This defendant denies each and every allegation of the complaint not hereinbefore answered.

NASH AND KINGSFORD,
Attorneys for Defendant, 51 *William St., N. Y. City.*

21 CITY AND COUNTY OF NEW YORK, *ss:*

Duncan A. McTavish, being duly sworn, deposes and says that he is the managing agent and attorney-in-fact of the defendant in this action; that he has read the foregoing answer and knows

the contents thereof, and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is not made by the defendant is that defendant is a foreign corporation, and the grounds of deponent's belief as to all matters not stated upon his knowledge are information and instructions from the defendant and the possession of the correspondence referred to.

A. McTAVISH.

Sworn to before me this 15th day of October, 1884.

CHAS. L. JONES,
Notary Public, N. Y. Co.

22 [Endorsed:] U. S. circuit court, so. district of New York. William B. Cooper, Jr., ag'st The Bank of British North America. Answer. Nash and Kingsford, att'ys for def't, 51 William St., New York city. U. S. circuit court. Filed Oct. 16, 1884. Timothy Griffith, clerk.

23 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the sixth day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Alfred C. Coxe, sitting as circuit judge.

WILLIAM B. COOPER, Jr.,
vs.
THE BANK OF BRITISH NORTH AMERICA.

Now comes the plaintiff, by Platt and Bowers, Esqs., his attorneys, and moves the trial of this cause. Likewise comes the defendant, by Nash and Kingsford, Esqs., his attorneys. Thereupon a jury is empaneled, and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Tuesday, December 7, 1886, the jury retire, and on their return render a verdict whereby they find for the plaintiff in the amount of $28,502.56.

24 It is ordered that defendant have a stay of proceedings on said verdict until Feb. 1, 1887.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

25 Circuit Court of the United States, Southern District of New York.

WILLIAM B. COOPER, Jr.,
ag'st
THE BANK OF BRITISH NORTH AMERICA. } Judgment, April 1, 1887.

This action and the issues therein having come on for trial before

Hon. Alfred C. Coxe, sitting as circuit judge of this court, and a jury, on the 6th and 7th days of December, 1886, and a verdict having been rendered in favor of the plaintiff and against the defendants on the merits of the action for the sum of twenty-eight thousand five hundred and two $\frac{56}{100}$ dollars and costs—

Now, upon motion of Platt and Bowers, attorneys for the plaintiff—

It is ordered and adjudged that William B. Cooper, Jr., the plaintiff, recover of and from the Bank of British North America the sum of twenty-eight thousand five hundred and two $\frac{56}{100}$ dollars, damages found by the jury, together with the sum of eight hundred and five $\frac{33}{100}$ dollars, costs and disbursements of this action and interest on said verdict, as taxed, amounting in all to the sum of twenty-
26 nine thousand three hundred and seven $\frac{89}{100}$ ($29,307.89) dollars, and that plaintiff have execution therefor.

Judgment signed this first day of April, A. D. 1887.

TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] Circuit court of the United States, southern dist. of N. Y. William B. Cooper, Jr., ag'st The Bank of British North America. Judgment. Platt and Bowers, pl'ff's att'ys, 54 William St., N. Y. city. U. S. circuit court. Filed April 1, 1887. Timothy Griffith, clerk.

27 United States Circuit Court, Southern District of New York.

WILLIAM B. COOPER, Jr.,
vs.
THE BANK OF BRITISH NORTH AMERICA. } At Law.

Motion for a New Trial.

This action is by William B. Cooper, Jr., to recover of the defendants the sum of £5,000, with interest, amounting in the aggregate to $28,502.56.

At the time of the transaction in question, in the spring of 1884, the plaintiff was a commission merchant in the city of New York. The defendants were engaged in the business of banking in the city of London, with a branch office in New York. During the same period Martin, Turner & Company, of Glasgow, Scotland, were in the East Indian trade, having a branch office in London. Their banking business was transacted at the Bank of Scotland, which also had a branch office in London. On the 14th of December, 1883, the plaintiff, having a letter of credit permitting him so to do, drew a draft upon the Glasgow firm of Martin, Turner & Company for £5,000, payable in London to the order of himself. This draft was due February 29th, 1884. It was the plaintiff's duty to take it up at ma-
28 turity. On the 26th of February he went to the office of the defendants in New York and purchased a cable exchange for £5,000, which was sent by them to London, reaching there the next day, February 27th. The money was on that day deposited in the Bank of Scotland, London, to the credit of Martin, Turner & Com-

pany. At the same time a dispatch was sent by the defendants in London to Martin, Turner & Company, at Glasgow, announcing that at that moment they were paying to their credit at the Bank of Scotland the sum aforesaid. On the same day they wrote to the Glasgow firm that the amount had been paid to their credit. The letter reached Glasgow on the morning of the 28th. It is undisputed that if a draft had been inclosed that also would have reached there at the same time. The payment to the Bank of Scotland was made pursuant to written instructions received by the defendants at London from Martin, Turner & Company. Upon the 28th Martin, Turner & Company, having received advices from their East Indian correspondents, became convinced that it was idle for them to continue longer in business, and upon the morning of the 29th they closed their doors. The money was paid to the Bank of Scotland without specific instructions, and a general credit was given to Martin, Turner & Company upon the books of the bank. The firm was indebted to the bank to a considerable extent, and the money was retained to lessen this indebtedness. The plaintiff received
29 no benefit from it. It was not used to take up the draft. The plaintiff insists that the money was lost to him by reason of the failure of the defendants to obey specific instructions given by him to them upon the 26th of February. He testified that he informed the agent of the defendants that the money which he was about to send to Martin, Turner & Company belonged to him; that it was sent to take up a draft shortly to fall due; that he wished it sent by cable to London, and from thence by mail, in the form of a check, to Martin, Turner & Company at Glasgow, and that the defendants agreed to these terms. The defendants deny that any specific instructions were given, and insist that the money was sent in the usual way and was paid to Martin, Turner & Company as directed by them. If the money had been sent by mail so that it could have been identified it would have been applied by Martin, Turner & Company to retire the plaintiff's draft. The jury were instructed that the relation of principal and agent existed between the parties; that the plaintiff had a right to prescribe the manner in which his funds should be sent, and if the defendants, knowing that the funds were his, and that they were transmitted for a special purpose, contracted with him to send them in a particular way and loss occurred by their failure to keep that agreement the plaintiff was entitled to recover. If, however, there was no such agreement; if the defendants did not know that the money belonged to the plaintiff, or that it was to be sent for a specific purpose; if the circumstances
30 were such that they had a right to assume that it was the money of Martin, Turner & Company; if, in other words, it was sent in the usual course of business without any particular instructions, then the defendants were entitled to a verdict. The jury found for the plaintiff. The defendants excepted to the refusal of the court to direct a verdict in their favor, and also to the refusal to charge that the money belonged to Martin, Turner & Company as soon as it came under their control, and also to that portion of the charge where the jury were instructed, in substance, that if they

found the agreement to be as stated in the plaintiff's testimony he was entitled to recover.

The defendants now move for a new trial upon the ground that the plaintiff has no cause of action, and that the verdict is against the weight of evidence.

JOHN M. BOWERS,
For the Plaintiff.
STEPHEN P. NASH,
For the Defendants.

COXE, *J.*:

The verdict of the jury has settled the disputed question of fact. The plaintiff's version of the transaction must be taken as the true one. The following facts are established:

On the 14th of December, 1883, the plaintiff drew a draft for £5,000 on Martin, Turner & Company, of Glasgow, which
31 matured February 29th, 1884. It was his duty to take up this draft. On the 26th of February the defendants, knowing that the money handed them by the plaintiff belonged to him and that it was sent to retire a draft, agreed with him to forward it by cable to London and by mail, in the form of a check, from London to Martin, Turner & Company, at Glasgow. Instead of doing this the defendants, without the knowledge of the plaintiff and contrary to his instructions, paid the money to the credit of Martin, Turner & Company at the Bank of Scotland, in London. Had they performed their agreement the money would have been saved by the plaintiff. As it was, it was lost to him.

The question is whether upon these facts the plaintiff can recover. It is not necessary to enter at this time upon an extended discussion of the authorities cited by counsel, for the reason that upon the facts as stated the case of the Southern Express Company *vs.* Dickson, 94 U. S., 549, seems to be controlling. It seldom happens that two cases are exactly parallel upon the facts. In the Dickson case the property in question was tobacco and not money, and it was to be sent by express and not by telegraph and mail; but it is difficult to perceive why the principle there announced is not applicable here. The instructions given to the jury in the two cases were substantially identical. The verdict in that case was the same as in this, and upon the facts there found the Supreme Court said: We
think the rule is that where the consignor is known to
32 the carrier to be the owner the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated.

It is thought that the plaintiff is within this rule, and that this court, as the law now stands, would not be justified in disturbing the verdict.

The motion is denied.

(Endorsed:) United States circuit court, southern district of New York. William B. Cooper, Jr., *vs.* The Bank of British North

America. Decision. Coxe, J. U. S. circuit court. Filed Mar. 9, 1887. Timothy Griffith, clerk.

33 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms, in the post-office building, in the city of New York, on the 11th day of March, 1887.

Present: Hon. Alfred C. Coxe, justice.

WILLIAM B. COOPER, J-.,
ag'st
THE BANK OF BRITISH NORTH AMERICA.

A motion for a new trial on the part of the defendant having been made herein on the minutes, after hearing Stephen P. Nash, Esq., of counsel for defendant, in support of said motion, and John M. Bowers, of counsel for plaintiff, in opposition thereto, or-
34 dered that the said motion be, and the same is hereby, denied.

ALFRED C. COXE.

Endorsed: U. S. circuit court, S. D. of New York. William B. Cooper, Jr., ag'st The Bank of British North America. Order denying motion for a new trial. Platt & Bowers, pl'ff's att'ys, 54 William St., N. Y. U. S. circuit court. Filed Mar. 12, 1887. Timothy Griffith, clerk.

35 United States Circuit Court, Southern District of New York.

WILLIAM B. COOPER, Jr.,
against
BANK OF BRITISH NORTH AMERICA.

Appearances: Messrs. Platt & Bowers, for the plaintiff; Messrs. Nash & Kingsford, for the defendant.

Afterwards, to wit, at a circuit court of the United States held at the court-rooms, in the United States post-office building, in the city of New York, before Alfred C. Coxe, Esq., judge of the United States circuit court for the district, appointed to hold the said circuit court on the 6th day of December, A. D. 1886, the aforesaid issues so joined between the parties as aforesaid came on to be tried by a jury for that purpose duly impanelled, at which day came there as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid, for that purpose duly impaneled to try the said issues, being called, also came and were then and there in due manner chosen and sworn to try the said issues.

36 And upon the trial of the said issues the counsel for the plaintiff, to maintain and prove the issues on his part, called—

WILLIAM B. COOPER, Jr., the plaintiff, who, being duly sworn, testified as follows:

I am the plaintiff in this action, and I know the agency of the Bank of British North America, the defendant in this action. In February, 1884, it was located in Wall street, nearly opposite the custom-house. At that time I was a commission merchant, and I am still one. I think I had known the Bank of British North America, prior to February, 1884, about four or five years, and during that period had had many business transactions with them. It consisted of buying bills of exchange on demand on London; in selling such drafts on places in Europe at sixty days' sight or otherwise, and it also consisted of my buying cables of them to cover the drafts that I sold. I was in the habit of drawing drafts upon the firm of Martin, Turner & Company and of meeting those drafts at their maturity by remitting funds. Sometimes I may have remitted by mail, but very seldom; generally by cable. I had made such remittances, through the defendant in this action, by cable during the years 1882, 1883, and 1884. On the 26th of February, 1884, I called at the office of the agent of the defendant in this city, and saw Mr. McTavish, who was in charge of the office here, and had a conversation with him.

Q. Please state to the jury that conversation.

37 THE WITNESS: I went into the Bank of British North America on the 26th of February, 1884. I saw Mr. McTavish. He invited me inside the railing and asked me what he could do for me. I said I wanted to get a rate of cable transfer for five thousand pounds that I wished to send to my friends in Glasgow. He asked me whether I wished him to mail a check or to telegraph it through from London to Glasgow. I told him I wanted him to mail a check to Glasgow. He told me the rate was 490½, which I thought was rather high, but finally we closed it, and I attempted to make out an order for the draft—for particulars of how I wanted it sent—and he said that he would save me the trouble, as I was seated next to his desk, which was a circular one, and I couldn't write conveniently. I never saw the memorandum or the order he made out, but he told me the rate was 490½, and he said he understood the check was to go by mail from London to Glasgow, to be cabled to their London office and from their London office to be mailed to Glasgow. He had two rates of cabling for me. One was a rate when he mailed a check to my friends at Glasgow and another was when he telegraphed it up. When he telegraphed it up he charged me an extra rate, because he said he had to pay a commission in Glasgow of some amount. What that rate was I don't know, but it was very small; perhaps a half a cent on the pound.

Q. You had discussions with him prior to this time about your making these remittances to take up your drafts?

A. I had, and he stated to me the terms on which he
38 would make the remittances, to go by mail to Glasgow and also by telegraph. We had two rates. One was by mail from London and one by telegraph from London to Glasgow. I

think I availed of the telegraph transfer from London to Glasgow on one occasion, but I can't locate it.

By the COURT:

Q. When was the draft due?

A. It was due on the 29th day of February, three days after I sent the money by cable.

By Mr. BOWERS:

Q. Were you cognizant of the length of time that would elapse to take a letter by mail from London to Glasgow?

A. Yes; I was quite well aware of it, because I have been over the road half a dozen times. A letter mailed on the 27th of February from London could not reach Glasgow possibly before the morning of the 28th, and this cable transfer, being directed here on the 26th, would be received in London on the 27th, and if the letter had been mailed from London on the 27th it would have reached Glasgow on the morning of the 28th. The Bank of British North America gave me a memorandum receipt at this time for this money.

Q. (Showing witness a paper.) Is this the paper?

—. ——.

By Mr. NASH:

Q. You said you wished to remit to your friends. Did you mention the name of your friends?

A. I did not mention them because a great many people were standing in the office, and I didn't mention their names at first because I did not want them to know who I was remitting
39 money to, but Mr. McTavish really knew who the parties were, because I had no other parties. Yes; this is the receipt I got.

Q. Do you know whether or not on that morning anything was said about this money being remitted to take up a draft?

A. Yes; I had a conversation with Mr. McTavish upon the character of the bills that I drew on Martin, Turner & Company, of London, as to their goodness.

By Mr. NASH:

Q. On this morning of the 26th of February?

A. On the morning of the 26th of February.

By Mr. BOWERS:

Q. State that conversation that occurred on the morning of the 26th.

A. I told him that he had hesitated some five or six weeks previous about taking a bill for five thousand pounds drawn on or about the 16th of January, 1884, and I wanted to tell him the character of the bill that I drew. These bills were drawn under a letter of credit of Martin, Turner & Company, and I wanted to explain to him that those bills would, in my opinion, be good under most any circumstances, because I always took up those bills at maturity, and

these very cables that I had bought and was buying of him that day was to take up one of those five-thousand-pound bills. I told him that at that time because I thought he had hesitated before, though finally he did take the bills. He had thought he had rather more of the bills than he really had, and they had a rule in London whereby they were limited to a certain number of pounds sterling that they should take upon any single-name paper, and he had looked upon this as a single-name paper, because he really didn't think so much of me as a drawer. That is about all the conversation had at the time, and he said at that time that he was quite satisfied with the bill and he was apparently so, and he had shown his satisfaction by taking it. The purport of the conversation I refer to was with reference to the sale of drafts on Martin, Turner & Company that I had made or offered to make to the Bank of British North America, and in connection with that conversation, which came about, I believe, by his speaking to one of my clerks some time before on the subject, I called his attention to the fact that I had made these cable remittances to take up those very drafts, and, among other remittances, that this very remittance was being made for such purpose. I learned afterwards that this five thousand pounds had not been paid to Martin, Turner & Company, at Glasgow, as I had directed, and after I learned it I had some little correspondence with the defendant here at New York on that subject.

Q. Did you, on the 24th of March, send a letter to Mr. McTavish, at the Bank of British North America here?

A. I did.

Q. (Showing witness a copy of letter.) Is that a copy?

A. Yes.

(The letter dated March 24, 1884, is offered in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 2.)

NEW YORK, 24 *March*, 1884.

D. A. McTavish, Esq., Bank of British North America, New York.

DEAR SIR: I purchased from you on the 26th ultimo a cable transfer for £5,000 on the court of directors of the Bank of British North America, London, with instructions to pay same to Martin, Turner & Co., Glasgow, for my account. Will you kindly inform me whether said instructions were cabled by you and what disposition has been made of the cable transfer of £5,000 by the court of directors? What is the course usually adopted by your bank in London in similar cases of cable transfer when the parties reside out of town?

One of the objects I have in view in making these enquiries is that I have been informed through friends on the other side that it is quite likely the trustees of the estate of Martin, Turner & Co. may have to apply the £5,000 to the purpose for which it was intended.

I remain yours respectfully, W. B. COOPER, JR.

Q. You received a reply to that letter?
A. I did, and this is it.

(The letter dated March 24, 1884, addressed to Mr. Cooper, is offered in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 3.)

Letters should be addressed to "To agents."

42 Agency Bank of British North America, 52 Wall street.

P. O. box 115. NEW YORK, 24 *March*, 1884.

W. B. Cooper, Jr., Esq., 168 Pearl St., city.

DEAR SIR: We beg to acknowledge receipt of your letter bearing to-day's date and say that the transfer referred to was sent as follows:

"Martin, Turner & Co., Glasgow, £5,000, ac. W. B. Cooper, Jr."

The usual course is for our London office to send a cheque if the transferee is out of the city.

Yours truly, H. STIKEMAN, *Agent.*

Q. You wrote another letter to the Bank of British North America on the 24th of April in this city?
A. Yes, sir; this is a press copy.

(The letter dated April 24, 1884, addressed to the defendant and signed by Mr. Cooper, is offered in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 4.)

NEW YORK, 24 *April*, 1884.

The Bank of British North America, New York.

DEAR SIRS: Advices have just come to my hands which seem to point to the following as the history of the remittance I en-
43 deavored to make through you to Martin, Turner & Co., Glasgow, on the 26th of February last.

On that date I purchased from you a cable transfer for £5,000, which I instructed you to remit to Martin, Turner & Co., at Glasgow, for my account.

It appears that the cable transfer was received by your bank in London on the 27th of February, and that, contrary to the instructions given, they, on that day, instead of forwarding £5,000 to Martin, Turner & Co. at Glascow, paid it into the Bank of Scotland at London to the credit of Martin, Turner & Co.

Had my instructions been complied with the remittance would not have been received by Martin, Turner & Co., Glasgow, until they received letters from their East India houses, which led to the immediate determination on their part that no honorable course was left them but to announce their suspension, and this was done on the 29th of February, when the Bank of Scotland appropriated the £5,000 that you had deposited with them against a general balance of the account between them and Martin, Turner & Co.

This £5,000 was remitted by me for Martin, Turner Co., at Glasgow, at their express request, to take up an acceptance drawn by me upon

them and maturing on the 29th of February, and had my instructions been complied with and the money remitted to them at Glasgow it would have been so used.

The result is that the Bank of Scotland, London, gets the benefit of the £5,000, and I stand liable on the acceptance which I had remitted this money to take up, and am obliged to pay the same, and have thus lost my £5,000.

It is with great regret that I feel obliged to notify you that as between your bank and myself I shall be compelled, owing to your having caused this loss by violating my instructions, to look to you for the reimbursement of my £5,000, and I give you this notice at the earliest moment, in order that you may, if possible, follow the money into the hands of the Bank of Scotland, who doubtless appropriated it without making any advances upon the faith of the deposit in favor of Martin, Turner & Co.

I hope that your counsel and mine may be able to agree upon a statement of the facts upon which a very quick determination may be had as to whether or not I am entitled to a return of the money I paid you for this cablegram.

I remain, very respectfully, yours,

W. B. COOPER, JR.

(N. B.—The word "at" before "Glasgow," the second time the word "Glasgow" occurs in the above letter, was interlined in the original before the defendant received it and at no other place.)

Q. Did you receive a reply to that letter?

A. I did. This is the reply.

(The letter dated April 25, 1884, addressed by the defendant to Mr. Cooper, is offered in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 5.)

Letters should be addressed to "To agents."

45 Agency Bank of British North America, 52 Wall street.

P. O. box 115. NEW YORK, 25 *April*, 1884.

W. B. Cooper, Jr., Esq., New York.

DEAR SIR: Your letter of yesterday is duly to hand. After communicating with our London office we will write you further.

Yours faithfully, H. STIKEMAN, *Agent.*

Q. And on the 20th of May you received another letter from them in response to your letter of April 24?

A. I was not in New York at that time. They sent me this letter of the 20th of May, which refers back to it.

(The letter dated May 20, 1884, addressed to Mr. Cooper and signed by the defendant, is offered in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 6.)

Letters should be addressed to "To agents."

Agency Bank of British North America, 52 Wall street.

P. O. box 115. NEW YORK, 20*th May*, 1884.

W. B. Cooper, Jr. Esq., city.

DEAR SIR: Having heard from our London office regard-
46 ing the payment of £5,000, we shall be glad to receive a call from you at your convenience.

Yours faithfully, D. A. McTAVISH, *Agent.*

Q. You were abroad when that was received?

A. I was, and any call that was made or communication received, any answer to that call was by one of my clerks or assistants, Mr. Walker.

Mr. BOWERS to Mr. Nash: Have you in court a copy of the cable that was sent by your bank?

Mr. NASH: No, sir; it is incorporated in this letter in evidence—Exhibit No. 3.

Mr. BOWERS: I will read in evidence this receipt, marked for identification No. 1.

(Plaintiff's counsel reads in evidence the receipt heretofore marked for identification No. 1, and it is marked Plaintiff's Exhibit No. 1.)

NEW YORK, 26*th Feb.*, 1884.

W. B. Cooper, Jr., Dr., to the agents Bank of British North America, 52 Wall street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Co., Glasgow, £5,000, at 4.90½ ---------- $24,525

Cost of cable ---------- 2

$24,527

47 This transfer is sold without responsibility to the Bank of British North America or their correspondents for error or delay in transmission.

(Plaintiffs' counsel offers in evidence a letter dated June 7, 1884, from Mr. Cooper to the defendant, and it is marked Plaintiff's Exhibit No. 8.)

W. B. Cooper, Jr., 168 Pearl street, New York.

NEW YORK, 7*th June*, 1884.

Messrs. D. A. McTavish and H. Stikeman, agents Bank of British North America, New York.

DEAR SIRS: Would you have any objection to informing me what were the code expressions with which you were provided relative to remittances sent by me to Martin, Turner & Co.? Did you not have different cipher words to express the following: "Pay Martin, Turner & Co., Glasgow;" "Pay Martin, Turner & Co., Glasgow, for account of W. B. Cooper, Jr., New York;" "Pay Martin, Turner & Co., London."

These were the forms of expression I requested you to put in your code at the time I first commenced making remittances to Martin, Turner & Co. by cable, and I presume I am correct in stating the phrases stood in this shape.

I remain, yours respectfully,

WM. B. COOPER, JR.,
Per CHARLES P. WALKER.

48 (Plaintiff's counsel offers in evidence a letter dated June 9, 1884, from the defendant to Mr. Cooper, and it is marked Plaintiff's Exhibit No. 7.)

Letters should be addressed to "To agents."

Agency Bank of British North America, 52 Wall street.

P. O. box 115. NEW YORK, *9th June*, 1884.

W. B. Cooper, Jr., New York.

DEAR SIR: Replying to your letter of 7th inst., our cipher words with our London office, to which you refer, represent the following phrases:

"Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr.," and "Martin, Turner & Co., 3 Market buildings, 29 Mincing Lane, ac. W. B. Cooper, Jr."

The word to mean the first of these phrases was used in cabling the £5,000 as per your requisition.

Yours faithfully, D. A. McTAVISH, *Agent.*

Cross-examined by defendant's counsel:

By Mr. NASH:

49 I think it was about one o'clock in the day when I called on Mr. McTavish to purchase this cable transfer on the 26th of February, but I am not positive on that subject. The whole transaction was closed at one interview. I did not give my check at the time. I got the receipt, Exhibit 1, when I sent my check. I sent my check by a messenger. I did not take it myself. I don't remember taking the check myself. I don't think I did. I wouldn't swear positively to that fact, though. I know I did not give my check at the time. I think I got a bill embracing the transaction, but I wouldn't swear. I think it is more than probable I took the bill with me when I left McTavish's office. I either took it back myself with a check or sent it. I think I sent it, and the bill was returned to me receipted. I had received similar bills to this, and was familiar with the handwriting. I wouldn't swear whose it is, for I never saw them make it out. I know it is that of some one in the office.

On the morning of the 26th, when I arranged for the rates of exchange with Mr. McTavish, I may have had some conversation with Mr. Stikeman or some other one in the office. I don't remember any detailed conversation with Mr. Stikeman at the time. My

conversation was with Mr. McTavish. It was in the general office, in the inner place like this, with a low railing around, so that other people were about and could have heard. I told him specifically on that morning, after I had purchased the cable transfer,
50 that this cable transfer that I was purchasing was for the purpose of taking up some bill of exchange which I had drawn on Martin, Turner & Company. I purchased this cable transfer in order to put Martin, Turner & Company in funds to take up a bill of five thousand pounds which matured on the 29th of February. It was my bill of exchange drawn in New York upon Martin, Turner & Company, Glasgow, and maturing on the 29th. That includes the grace. It was due the 26th, and before the 29th Martin, Turner & Company suspended.

The handwriting of the letter dated the 24th of March, Exhibit 2, addressed by me to Mr. McTavish, is that of Mr. Charles P. Walker, who was then a clerk with me. I am inclined to think it was dictated by me, but I don't remember. I read it before signing it. At that time I had taken counsel in reference to this matter—consulted lawyers—and this letter was written after I had consulted counsel, as far as I remember. The letter of April 24, 1884, Exhibit No. 4, was written by the same Mr. Walker and signed by me, and that I remember dictating. I do not remember whether the word "at" just before "Glasgow" was inserted by my instructions after I had dictated the letter to Mr. Walker. If it was written by Mr. Walker in the first instance without the word "at" in it, it must naturally have been inserted by my instructions, unless he inserted it on his own responsibility. The letter was not dictated stenographically.

As a general rule I write the letter myself on pieces of memo-
51 randum—draft letters. Sometimes I dictate it as he takes it down. I am inclined to think I dictated that letter, but I couldn't swear positively. I was the agent of Martin, Turner & Company in New York. I have received consignments from them from time to time and sold the consigned property and paid duties upon it. I drew on Martin, Turner & Company by authority of letters of credit which they gave me, and I sold a great many of such drafts to the Bank of British North America. I did not sell the particular five-thousand-pound bill which matured on the 29th of February to the Bank of British North America. I sold that to the Canadian Bank of Commerce. The defendant has no interest in that bill. The bill this cable was to take up was held by the Canadian Bank of Commerce. I left for Europe on the 14th of May, so that nothing took place between me and the defendant on this side after the 14th of May until I returned, some time in September. I left Mr. George C. Wild and Mr. Walker in charge of my business. Mr. Wild had a power of attorney from me. Mr. Walker was entirely familiar with this transaction as I understood it—with the Bank of British North America—and he knew before I went away my version of it, and this letter written in my name is by the same person to whom I dictated that previous letter, Mr. Walker. He seems to have supposed that I had arranged with Mr. McTavish for the defendant for three forms of cable transfer. It is my idea

that he had three forms. My opinion was not changed
52 after I saw the reply to that letter of the 9th of June. I am very confident that they arranged to have three forms; but they may have neglected to put it in. There was not a different rate for each form; only two rates for two forms. When the money was to be sent to Martin, Turner & Company by telegraph from London to Glasgow, then the Bank of British North America was to charge me an extra rate of commission; but when that check was simply to go by mail from London to Glasgow—their own check, as they explained it to me—then there was no extra rate, because they didn't incur any. These are the only two different rates of exchange that I know anything about. I don't remember ever to have arranged, in the course of my dealings with Mr. McTavish for the defendants in New York, for a cable transfer which included these words: "Retire the acceptance or note maturing so and so." I don't remember telling Mr. McTavish on the 26th of February, in my conversation with him, that the bill matured exactly on the 29th, but I do certainly remember that I told him that the five-thousand-pound cable that I was sending to my friend at Glasgow was to take up a bill for a like amount due in a day or two. Whether I said the 28th or 29th, I can't tell you. I think I told him who held the bill. I think I told him that either he held it or the Canadian Bank of Commerce, I didn't know which. I believe that is so. I won't swear to that positively.
53 I signed that bill myself. Yes; I drew it. It was payable in London at the Bank of Scotland, I believe. I only wrote it payable in London. I didn't know where it was going to be paid. It was a bill drawn on Martin, Turner & Company, Glasgow, Scotland, payable in London. They had a house in London, 29 Mincing Lane. I did not say to Mr. McTavish exactly that I wanted a cable transfer to be mailed from London to Glasgow. I said I wanted to purchase a cable transfer to be sent to my friends at Glasgow. I said nothing else at that time. He asked me whether I wanted it sent by mail or telegraph up to Glasgow. I told him I wanted it mailed. That was the conversation. This took place on the 26th of February in that office, and I have every reason to believe Mr. McTavish was the person. I haven't the slightest doubt about it. Mr. Stikeman was in the office at the same time, I think, or somebody connected with the bank. I had at that time reason to suppose that it made a difference whether Martin, Turner & Co. received this money in London or in Glasgow. It made every difference to me. I wished it mailed for a special purpose, because the English laws are very strict on that thing, and I knew what that was, because I have had friends who have had similar cases, and I wanted that check mailed to Glasgow, so that my friends could use that money to take up my bills. Now, if it had not been done, or had not been in a check, so as to ear-mark it, as the English
54 term it, then I might have lost it; but if it was sent in a check by mail and these parties failed I could have saved my five thousand pounds out of the estate, because my five thousand

pounds could have been identified and taken out of the estate, if paid in, in case they had failed or acted dishonorably.

I did not on the 26th of February suppose that my friends and principals, Martin, Turner & Co., were about to fail. I shouldn't have sent it if I had. I had in every case prior to this made a special request that the money for which the cable transfer was given should be remitted by mail from London to Glasgow to Martin, Turner & Co. In every case, either by mail or cable, the question always arose. They asked me whether it should be mail or cable, always. In most every case the question arose and they know that, too. It was not an afterthought that came into my head when I wrote this letter of the 24th of March; no, sir. It was a question discussed in all cases.

Q. Now, then, if that was the fact, why did you, when you wrote that letter of the 24th of March, 1884, omit all allusion whatever to any wish expressed by you that the money should be transmitted by mail from London to Glasgow?

A. Well, I didn't think it was any use in giving them all our case.

Q. I read you this paragraph: "I purchased from you on the 26th ultimo a cable transfer for five thousand pounds on the board of directors of the Bank of British North America, London,
55 with instructions to pay the same to Martin, Turner & Company, Glasgow, for my account. Will you kindly inform me whether such instructions were cabled by you and what disposition has been made of the cable transfer of five thousand pounds by the board of directors? What is the course usually adopted by your bank in London in similar cases of cable transfer when the parties reside out of town?"

A. Exactly.

Q. Now, after calling your attention to this letter written by you on the 24th of March, about a month after the purchase of this cable transfer, you now presume to say, sitting in that chair, that you purposely omitted in this letter all allusion to your alleged instructions to send that cable by mail from London to Glasgow?

A. I won't say I purposely did it. I won't say I purposely did it, but I didn't intend to convey in the letter any more than I thought was my own good.

Redirect by plaintiff's counsel:

Q. Now, I am going to ask you to go back to an earlier date, where you referred to an interview on the 26th of February, in which you say you called Mr. McTavish's attention to the fact that this money was being transmitted to take up one of that class of drafts which you had been in the habit of selling him. Please state how that conversation came about at that particular date.

A. On the 16th day of January, 1884, I sent Mr. Charles P. Walker, who was with me at that time, to the Bank of British North
56 America for the purpose of selling them a bill on Martin, Turner & Co., Glasgow, for five thousand pounds. Mr. Walker returned and said that he had had a conversation with Mr. McTav-

ish, and he seemed to hesitate about taking the bill, but finally said if I would make that bill in two thousand pounds and three thousand pounds he would take them. This hesitancy on the part of Mr. McTavish naturally excited my suspicions, and I began to think whether he could have formed any opinion of Martin, Turner & Co. that was not favorable; yet, at the same time, as he agreed to take the bills, only split it up as he wanted them, I thought very little of it, and I requested Mr. Walker to explain to Mr. McTavish the character of the bills, which, when he returned, he told me he had; and subsequently I explained to Mr. McTavish exactly the nature of the bill, and that I covered these bills at maturity, and that the cables I bought of him and others were for the protection of these bills that I had drawn on Martin, Turner & Company at Glasgow; and it was at the time I purchased this bill now in suit that I explained the matter to him. Mr. Walker's conversation was held with him some weeks prior.

Q. (Showing witness a paper.) Is this the bill in suit, or at least is this the five-thousand-pound bill of exchange that this money was intended to take up? Does this refer to that exchange?

A. Yes.

57 Q. I hold in my hand three other bills drawn by you on Martin, Turner & Co., two for five thousand pounds each and one for three thousand pounds, making in all thirteen thousand pounds, which I understand should have been sent here this morning by the agent of the Canadian Bank of Commerce? Is that your understanding?

A. That is my understanding of it.

Q. As to this bill in suit, have you since taken that bill up?

A. Not in full; no. I have paid it partly and promised to pay the balance, and I have been given indulgence on that point by the holder.

Q. About what proportion have you paid?

A. Well, there is eighteen thousand pounds in all, and I have paid thirteen.

Q. When you say there are eighteen thousand pounds in all and you have paid thirteen thousand, were they held by the Canadian Bank of Commerce?

A. Held by the Canadian Bank of Commerce and the Bank of British North America in common, as I understood it.

Mr. BOWERS: I offer this bill in evidence; also the protest.

(Both received in evidence and marked Plaintiff's Exhibit No. 9 and No. 10.)

No. 52. £5,000 0 0 st'g. No. 9470.

NEW YORK, 14 *December*, 1883.

Sixty days after sight of this third of exchange, first and second of same tenor and date unpaid, pay to the order of myself
58 five thousand pounds sterling for value received, which charge to account of as per letter of credit dated Glasgow, 6 November, 1883.

W. B. COOPER, JR.

To Messrs. Martin, Turner & Co., Glasgow.
Payable in London.
[In pencil on margin:] Wm. B. Cooper, Jr.
Across the face of the original bill is written: Glasgow, 28th Dec., 1883; due 29th Feb'y, 1884.
Accepted, payable at the Bank of Scotland, London.
MARTIN, TURNER & CO.

(Endorsed.)

Pay to order of J. H. Goadby, B. E. Walker, and D. Woolverton, agents for the Canadian Bank of Commerce, or any one of them.
W. B. COOPER, JR.

(Exhibit No. 10 is a protest of the above bill in the usual form.)

Recross by defendant's counsel:

This bill appears to be the third of exchange, and I suppose the acceptance of Martin, Turner & Co. was upon one of the other parts. I had blanks in my office, which I filled up. This was one of my own forms of bills of exchange that I was in the habit of drawing upon Martin, Turner & Co. I have not the letter of credit referred to in it. The bank always keeps the letter of credit—the Canadian Bank of Commerce, if I sold to them. I always give them the letter of credit. When I sell them bills on Martin, Turner & Co. we always give up the bill of credit; otherwise we couldn't draw. I never got it back because it was marked on it as cancelled—used up. It was of no use, having been initialed by the bank to whom I issued the bills. I delivered a letter of credit for each bill
59 that I drew.

By the COURT:

Q. Where were these accepted?
A. Accepted in Glasgow.

By Mr. NASH:

I base that answer upon my general knowledge. I didn't see the acceptance written in the bill. In February, 1884, I was in general correspondence with Martin, Turner & Co. I sent them messages by cable from time to time. I had code words for the messages which passed between me and Martin, Turner & Co., and from time to time I sent them messages by cable—by our code in all cases. According to my general knowledge of the business, Martin, Turner & Co., if they hadn't got into difficulty, would, I presume, have taken up this acceptance payable in London with the check that I mailed to them—ordered mailed to them—from London. That I presume from my general knowledge of the business.

Q. They wouldn't have taken them up with their own check?
A. That I don't know.
Q. And then you don't know the other?
A. No; but I presume that would be the proper way.

Q. That is your personal guess?
A. Yes; that is my personal guess.

The plaintiff, further to maintain the issues on his part, called DUNCAN ARCHIBALD MCTAVISH, who, being duly sworn, testified as follows:

I am one of the agents here of the defendant, and I was one of such agents in the month of February, 1884, and I have been
60 for about seven years, I think—since 1876 continuously. I produce here to-day the records of that bank as kept here in New York, showing the cable that I sent to the Bank of British North America, at London, concerning the transaction in suit here. They are all recorded in this book. I believe this to be the record—No. 1204. This is the record of the cable which contained the order for this remittance. It was addressed to the Bank of British North America, London. They understood distinctly it was sent by me. This cable, which included the transfer in suit, begins with the words "Sent five court." That means the home office—to the home office—to the London office. It ends "From Messrs E. B. & Co." The last words are either "document" or "Messrs. E. B. & Co."

Mr. BOWERS: I will offer in evidence the whole of this entry down to the word "document."

The entry is read in evidence by plaintiff's counsel and marked Plaintiff's Exhibit No. 11, as follows:

Sent 5 court.		
No. 1202	C. de Murrieta & Co., Lon., o. a. Florez, Cadiz	£50
1203	A. M. Gillespie & Co., London, o. a. Chas. Morrison & Co.	700
1204	Martin, Turner & Co., G'w, o. a. W. B. Cooper, Jr.	5,000
1205	Inman S. S. Co. o. a. their N. Y. ag'y	2,000
61 1206	John Edwards & Co., L'pool, o. a. Sam'l Quincy	500
1207	J. & A. D. Grimond, Dundee	2,000
1208	Wilson Coltart & Co., L'pool, o. a. D. W. Manwaring	800
1209	Same (as) 1175 (Louisa Coghlan, Elstree, Herts)	100
1210	Fenton, Connor & Co., Belfast, o. a. Geo. Hazelton & Co.	500
1211	Jno. Patton, Jr., & Co., London	1,500
Received from Lazard Bros. & Co.		10,000

If you approve, advise documentary credit 1068 same (as) 897 (in favor of Edwin Butterworth & Co., M'ter), o. a. Jas. Pirnie, attorney, for £10,000 (d'fts a. 60, 90 & 4 N. Y. St. against full invoice cost of paper stock; insurance you will please look after in London), Edwin Butterworth guaranteeing reply by telegraph.

At what rate can you sell double eagles? Your cable—may I purchase the exchange of (Greville A.) Palmer (on Dent, Palmer & Co.) £4,000 additional, without shipping documents?

(We debit you proportion of the above cable £1 17 | ; which please recover from Messrs. E. B. & Co.)

Mr. Stikeman can tell you about these matters better than I can.

The plaintiff, further to maintain the issues on his part, called
62 HENRY STIKEMAN, who, being duly sworn, testified as follows:

The money cabled over at the request of Mr. Cooper to Martin, Turner & Company, Glasgow, was sent "Martin, Turner & Company, Glasgow, on account of W. B. Cooper, Jr.," and then the amount is given.

By Mr. NASH:

Q. And that was represented by how many words?

A. It varied according to the amount; it might have been two or more. It could not have been less than two and it might have been more, according to the amount.

By Mr. BOWERS:

Q. Is there any entry in any book showing the transaction as it occurred here on the 26th of February, 1884?

A. Yes; you have it there.

Q. Didn't you make a charge of some sort in your books of this five thousand pounds?

A. It would have gone, of course, through the cash book. There was an entry in our book somewhere that Mr. Cooper had purchased a transfer of five thousand pounds to Martin, Turner & Co., Glasgow, for his account. Mr. Cooper had frequently purchased other cable transfers. I recollect there were purchases that he made where he directed the money to be telegraphed from London to Glasgow. On the 6th of September, 1883, he did this. That money was directed to be sent by telegraph from London to Glasgow, and we so instructed by our cipher. In the case of the draft in suit our cipher simply instructed our home office to pay Martin,
63 Turner & Co. five thousand pounds for account of W. B. Cooper, Jr. Where he directed it to be telegraphed up, then we used a different cipher. I used an additional word.

Q. Do you say that the cipher for that would have instructed the house on the other side that that was to be telegraphed up?

A. It would. There may be other instances in which he directed us to telegraph it up; I couldn't say. I recollect Mr. Cooper signed written orders for some of these transfers. They were not signed in all cases; could not say frequently. I have three here signed; there may be some more.

(Plaintiff's counsel reads in evidence the orders for cable transfers, and the one dated November 12, 1883, is marked Plaintiff's Exhibit No. 13.)

689.

Order for Cable Transfer.

NEW YORK, 12 *Nov.*, 1883.

To the agents of the Bank of British North America, 52 Wall street:

Transfer by cable to Martin, Turner & Co.; address, Glasgow, on account of—

Amount, £2,500.

Par, 12,125; rate, 485½.

Premium, 12.50; cost of message, $2.

64 Discount, —. Purchaser.

(Signed) W. B. COOPER, JR.

Net amount, 12,137.50.

C. P. WALKER.

The Bank of British North America is not responsible for any delays, interruptions, or errors of the telegraph companies or operators.

There was no order signed at the time of the transfer in suit, but we made out a memorandum ourselves similar to these orders that were signed in other cases, showing that the transfer was to be made to Martin, Turner & Co., addressed to Glasgow. Opposite their printed name was the word "Glasgow," the same as our cipher code book.

Cross-examined by defendant's counsel:

(Showing witness paper.) This appears to be the memorandum we so made.

The paper thus read is marked Defendant's Exhibit A 1, and reads as follows:

1204.

Order for Cable Transfer.

NEW YORK, *26 Feb., 1884.*

To the agents of the Bank of British North America, 52 Wall street:

Transfer by cable to *Martin, Turner & Co.*; address, *Glasgow;*

65 on account of *W. B. Cooper, Jr.*

Amount, *£5,000.*

Par, *24,250.*

Premium, *275;* rate, *490½.*

Discount, —. Cost of message, $*2.*

Net amount, *24,525.* Purchaser, —— ——.

The Bank of British North America is not responsible for any delays, interruptions, or errors of the telegraph companies or operators.

(Italics represent portions of above that were in writing, the remainder being a printed form.)

(MEM. FOR PRINTER.—Print portion of above underlined in italics.)

The plaintiff, further to maintain the issues on his part, called CHARLES P. WALKER, who, being duly sworn, testified as follows:

I reside in Brooklyn. I am with the firm of E. D. Turnure & Company, sugar brokers, as a clerk; been there a year. In the month of February, 1884, I was in the employment of Mr. William B. Cooper, Jr., the plaintiff in this action. I went with him in 1881, I think it was. He was a commission merchant. I kept several books of account, including the cash book, and wrote various letters, both foreign and domestic. I knew the Bank of British North
66 America or their agency here at that time. The agents were Mr. McTavish and Mr. Stikeman. Mr. Cooper did a considerable business with them one way and another. I went there under his direction to purchase cable transfers on the other side and to sell them bills of exchange drawn in this city. These transactions were comparatively numerous. Mr. Cooper also from time to time bought from them bills of exchange on other parties.

Q. Did you ever have any conversation with either of the agents concerning these cable transfers which Mr. Cooper was making through them, as to his object in making them?

A. I did, with Mr. McTavish. It was spoken of several times that they were to take up bills that had been drawn previously by Mr. Cooper on Martin, Turner & Company, Glasgow.

Q. Do you recollect whether at the outset of Mr. Cooper's business relations with these defendants in which he purchased cable transfers any conversation was had between you and Mr. McTavish or any one else representing the bank as to the manner of making the remittances—as to the remittances being made by cable to London, and then how it was made to Glasgow, so that you knew when it would reach Glasgow? If you do, please state it.

A. I don't remember that any time for its reaching Glasgow, whether sent in either of the two ways, was specially mentioned with the agent of the Bank of British North America, but I know that I had been informed by Mr. McTavish that their code
67 covered—I say informed by Mr. McTavish, either by his admission of the fact or by his stating it—that their code was arranged to cover at least two different ways, and I understood three, the understanding being that these remittances were made to Martin, Turner & Co., Glasgow, for account of William B. Cooper, Jr., New York, and that of two ways of sending them, one was to cover by mail from London and the other by telegraph from London to Glasgow. There is a difference in the rate of exchange, whether it was sent by telegraph or letter from London.

Q. Do you remember in the month of January, 1884, going to the Bank of British North America to sell them a bill drawn by Mr. Cooper on Martin, Turner & Company for five thousand pounds?

A. Yes, sir; and I recollect seeing Mr. McTavish at that time. I had a conversation with Mr. McTavish. I told him that Mr. Cooper would like to draw a bill on Martin, Turner & Co. and offered it to him to purchase. There was some hesitancy on the part of Mr. McTavish and, before naming any rate, he stepped aside and spoke

in regard to the matter to Mr. Stikeman, and then he again referred to me and said that they would take the bill, but, as a matter of convenience, if we would just draw it in bills of two thousand and three thousand pounds each. I said I presumed that would be satisfactory and reported to Mr. Cooper, who said that it was so, and that was, in fact, the way the bills were drawn finally and taken by the Bank of British North America. I reported to Mr. Cooper
68 their hesitation, and he instructed me to state to Mr. McTavish the nature of the bills, and that he, of course, understood—that is, that Mr. McTavish, of course, understood—that these were to be protected by Mr. Cooper by cable remittances upon their falling due later.

Cross-examined by defendant's counsel:

Q. On this occasion, when you were trying to sell five thousand pounds drawn by Cooper on Martin, Turner & Co., you say you were instructed to explain the nature of the bills?

A. Yes, sir. I mean by the nature of the bills that they were drawn to pay advances, such as freight and duty and the like, which Mr. Cooper had paid here on certain goods in his possession.

Q. You mean to say that you told the defendants, The Bank of British North America, that these bills which Cooper wanted to sell were drawn to reimburse himself for advances that he had made on account of Martin, Turner & Co.?

A. No, sir; I did not say that.

Q. I want to understand what it was that you explained.

A. I say that I explained to Mr. McTavish that the bills that were being drawn were to pay Mr. Cooper to put him in funds to pay certain advances which he had made on goods in his possession.

Q. Mr. Cooper says that he drew these bills by authority of letters of credit in each case?

A. He did.

Q. And what you wanted to state was that that wasn't simply kiting paper. It wasn't a combination paper, but it was
69 drawn for business transactions. Wasn't that what you tried to explain to Mr. McTavish?

A. Yes, sir; I presume so.

Q. You say these cable transfers which you negotiated were for the purpose of putting Martin, Turner & Co. in funds to pay the maturing draft that Mr. Cooper had drawn on Martin, Turner & Co.—to put Martin, Turner & Co. in funds to pay the maturing drafts of Mr. Cooper. Now, will you explain why, if these bills were drawn to put Mr. Cooper in funds for advances which he had made, why it was his duty to cover the bills after they had been accepted by Martin, Turner & Co.?

A. Because his name was on the bill.

Q. If he made any advances on Martin, Turner & Co., wasn't it Martin, Turner & Company's duty to accept and pay these bills themselves?

A. I didn't say that he paid duties for Martin, Turner & Co. I said he paid duties or advances on goods that were here in his possession.

Q. Not belonging to Martin, Turner & Co.?

A. Not belonging to Martin, Turner & Co.

Q. That was to convince Mr. McTavish that Mr. Cooper had advanced this money on goods of which he had control and which were in his possession?

A. Yes, sir.

Q. Now, you have stated that you were informed about two or three forms of cable transfers?

A. Yes, sir.

Q. Were you so informed by a letter which you received after Mr. Cooper went to Europe?

70 A. No, sir; I was informed so——

Q. Just wait a moment. You had better read the letter before you testify; it is a letter written by you. Now, did you write this letter which I have just shown you out of your own head or by instructions from Mr. Cooper?

A. I don't remember. I presume Mr. Cooper asked me to write the letter.

Q. He was not in New York at that time?

A. He was not in New York at that time.

Q. Can you state that you ever before writing that letter had any information from Mr. McTavish as to what the forms of cable transfer were which he had arranged with Mr. Cooper?

A. I had such information from Mr. McTavish himself, either by assent or by actual statement. At the commencement of this business of cabling and buying exchanges that we had been carrying on, say in 1882, at Mr. McTavish's office.

Q. What do you say was then said?

A. I presume the conversation took place in this way: We wanted to buy a certain amount of exchanges, and in buying of Mr. McTavish it was specified by me that it was to go, whichever it was, either by mail or cable from London, after reaching London from New York, and he went on to say that there were code instructions to cover those two points in the office of the Bank of British North America. I say that was either admitted by Mr. McTavish

71 or stated to be a fact by him. Those are the two forms I have in mind to indicate whether the Bank of British North America in London was to telegraph to Martin, Turner & Co. at Glasgow—whether it was to go by mail or telegraph from London to Glasgow.

Q. Now, did you understand that the expense of telegraphing from London to Glasgow was an item of difference in the two modes of transmission, whether it cost Mr. Cooper any more to cable or transmit in one way than the other?

A. Yes, sir; it did cost more one way—to send it by cable all the way through — to send it by telegraph—that is, from London to Glasgow. To cable from here to London and from London on to Glasgow by wire.

Q. Was this conversation which you claim to have had with Mr. McTavish in 1882 or 1883 in connection with any transaction you can recall?

A. No, sir.

Q. Don't you know that he made the arrangement in the first instance?

A. I know he made arrangements in the first instance.

Q. And did you go simply as a matter of curiosity or for the purpose of closing some transaction?

A. I went there for the purpose of buying a cable transfer.

Q. And can you connect this conversation with any one of the cable transfers which you attended?

A. No; I couldn't.

Q. Now, I want you to explain to me why Mr. Cooper should draw on Martin, Turner & Co. for duties advanced by Mr. Cooper
72 on goods in which Martin, Turner & Co. had no interest whatever?

A. Well, that is an arrangement which Mr. Cooper had made. It was agreeable to Martin, Turner & Co. That is the only explanation I make. They sent him certain letters of credit. The right of Cooper to draw on Martin, Turner & Co. was confined to the authority conferred by letters of credit given by Martin, Turner & Co. from time to time.

By Mr. BOWERS:

Q. In each instance when you went to the bank to arrange for cable transfer was or was not discussion had as to whether the money should be sent from London by mail or telegraph?

A. Always mentioned. We arranged to send by mail so as to get it there in time, a day ahead of the bill.

By Mr. NASH:

Q. If it was telegraphed from London up it would reach Glasgow a day quicker than if it went by mail, would it not?

A. Ordinarily; yes, sir.

Q. And was that sometimes desirable upon the part of Mr. Cooper?

A. Yes, sir.

The plaintiff, further to maintain the issues on his part, now read in evidence the deposition of Mr. John M. Martin:

My name is John M. Martin; I reside at Auchendennan; I am an East India merchant in Glasgow. I was in the same busi-
73 ness in the month of February, 1884, and I was a member of the firm of Martin, Turner & Co., doing business there. I knew William B. Cooper, Junior, personally, and I knew the defendant bank by name. Our firm had occasionally corresponded with its London branch. Mr. Cooper was the agent in New York of our firm. We received remittances from him through the defendant bank occasionally. There was a draft for £5,000 drawn

upon us by the plaintiff which matured on or about the 29th day of February, 1884. The plaintiff had agreed to and I did expect him to remit funds to take up the draft *of* maturity. On the morning of the 28th of February, 1884, we received from the defendant from its London office a letter, of which the following is a copy:

"BANK OF BRITISH NORTH AMERICA,
"LONDON, 27 *February*, 1884.

"Messrs. Martin, Turner & Co., Glasgow.

"GENTLEMEN: Having received instructions this morning by telegraph from our New York agents to pay you £5,000 on account of Wm. B. Cooper, Jr., New York, I beg to advise having paid that amount to your credit with Bank of Scotland, London.

"Your obedient servant,

"(Signed) A. G. WALLIS, *Secretary*."

74 "I wired you as follows this morning:

"We are paying five thousand pounds to your credit with Bank of Scotland here from New York, account of Cooper. Please remit 1 5 | for cost of telegram."

If the defendants had sent us draft or cheque for such £5,000 on the 27th by mail, it would have reached us at the same time as the above letter, viz., the morning of the 28th of February. According to the usual course of the mails, a letter mailed in London on one day, addressed to our firm at Glasgow, would reach us the morning of the succeeding day. Our firm received intelligence on the 28th day of February which led us to determine that we must suspend business. It was in the form of a letter of advices from our firm in Batavia, Martin, Dyce & Company. I showed such a state of affairs in Batavia that it would be impossible for us to meet our engagements. We suspended on the 29th of February, 1884, and closed our doors.

Q. What was done in the way of business on the 28th of February, 1884, by said firm?

A. After reading the letters and accounts from Batavia we consulted an accountant and law agent as to our position. Beyond that I do not remember that anything of importance was done.

Q. What was done with moneys received by said firm at Glasgow on the 28th February, 1884?

A. So far as I am aware, no moneys were received by the firm on that day.

Q. Do you know whether William B. Cooper, Jr., the plaintiff, on the 26th February, 1884, remitted to your firm, through
75 the Bank of British North America, the defendant in this action, £5,000?

A. I know that on the 27th February the defendant bank in London advised us of having received that sum from Mr. Cooper by cable. I do not know when he sent it, but presume it was on the 26th.

Q. For what purpose was the amount remitted?

A. It was to retire a bill of Cooper's for that sum falling due in London on the 29th.

Q. Was it remitted to take up a draft for that amount drawn by the said Cooper on you and falling due on the 29th February, 1884?

A. It was.

If the £5,000 remitted by Mr. Cooper had been received by our firm on the morning of the 28th of February, 1884, it would have been applied to retire the said bill falling due on the 29th or retained intact to be handed over to the trustee of the estate, to be applied to the purpose intended. It would have been given to the trustee for the purpose mentioned, unless directly applied by the firm for that purpose. No money was received by our firm on the morning of the 28th, but on the 29th we received from A. R. McMaster & Brothers, on account of Mr. Cooper, a draft for four thousand pounds to retire a bill of Mr. Cooper's for the same amount falling due the 3rd of March, which was applied for that purpose.

The £5,000 was paid into the Bank of Scotland, in London, to the credit of our firm by the defendant's London branch on the 27th February, 1884, and it was retained by the Bank of Scotland, which was a creditor of our estate.

76 Defendant's counsel reads cross-examination:

I had been a member of the firm of Martin, Turner & Co. in February, 1884, for, I think, about fifteen years. The draft of £5,000 enquired of was payable at the Bank of Scotland, in London. I am not aware who was the holder. I had no oral communication with the plaintiff in regard to the bill in question. The plaintiff was in America and our communitions with him were by letter or cable.

Our firm received the telegram stated at the foot of the letter given above to have been "wired" us the morning of the 27th February, 1884. The firm answered the telegram by letter. The letter hereto annexed, dated "142 Vincent street, Glasgow, 27 Feb., 1884," and addressed to "Bank of British North America, London," and signed "Martin, Turner & Co.," is in the handwriting of Alexander J. Turner, now in Queensland, and the signature is by Thomas Hinton Campbell, senior partner of our late firm. It was sent to the Bank of British North America, at London, on the 27th of February, and the telegram therein referred to is the telegram about which I have been already questioned. I believe we did not answer it.

The letter hereto annexed, dated "142 Vincent street, Glasgow, 3rd July, 1883," and addressed to "The Bank of British North America, Lombard street, London," and signed "Martin, Turner & Co.," was written by Edward Graham Eglinton, book-keeper
77 of the late firm, and signed by Thomas Hinton Campbell, senior partner, and it was sent on the day of its date to the Bank of British North America, in London. My firm never revoked or modified the last paragraph. Our firm received an answer to the letter mentioned. It is dated at London, July 4th, 1883.

The letter hereto annexed, dated "142 Vincent street, Glasgow, 15th August, 1884," addressed to "Messrs. The Bank of British North America, London," and signed "Jno. M. Martin," was written and signed by me, and it was sent upon the 15th of August, 1884, to the Bank of British North America, in London. The letter referred to by the words "the signature of the letter referred to is in the handwriting of Mr. Thomas Hinton Campbell, senior partner of the late firm," in said letter of 15th August, 1884, was the letter dated July, 1883, mentioned above, and the firm meant by the words "senior partner of the late firm," in said letter of 15th August, 1884, was the firm of Martin, Turner & Co.

My information about the remittance of £5,000 came solely from the letter and telegram of the defendant bank. The plaintiff, no doubt, advised our firm of his remittance, but his letter, if it came, went into the possession of our trustee. I did not know otherwise than by communication from the plaintiff for what purpose the said amount was remitted, and I did not have any communication on this subject other than by letter or telegram or cablegram. We knew that a remittance of five thousand pounds was coming
78 to retire this bill, but I cannot put my hands upon any letter which intimated that. This transaction came under a general arrangement with the plaintiff by which he was to draw bills upon our firm and retire them at maturity by renewals until he provided for them by the sale of produce consigned to him by our foreign branches and against which the original bills were drawn.

THE BANK OF BRITISH NORTH AMERICA,
LONDON, E. C., *4th July*, 1883.

Messrs. Martin, Turner & Co., 142 St. Vincent street, Glasgow.

DEAR SIRS: I beg to acknowledge receipt of your favor of 3rd inst. I note your request to pay all cable remittances for you from New York to the credit of your account with the Bank of Scotland, Lothbury, when remitted on account of Mr. W. B. Cooper, Jr., of New York, and will take care to inform you by wire of our having done so.

Yours faithfully,
(Signed) A. G. WALLIS, *Sec'y.*

The COURT: Do you propose to contradict the evidence of the plaintiff that he told this agent that this money was for a specific purpose?

Mr. NASH: We propose to contradict the evidence. We knew generally, of course, that these remittances were to take up
79 drafts which were maturing; but we particularly propose to contradict all the evidence which tends to show that there was any particular mode of payment, either by mail or telegraph, from London to Glasgow, as testified to by Mr. Walker and Mr. Cooper.

The plaintiff, further to maintain the issues on his part, now reads in evidence the deposition of Robert Davidson, of London:

My name is Robert Davidson; my business residence is at 43 Lothbury, in the city of London, England, and my occupation is that of manager of the London branch of the Bank of Scotland, and I held such position on the 27th of February, 1884. I know the firm of Martin, Turner & Co., doing business at Glasgow, Scotland. They had an account with the Bank of Scotland. The Bank of British North America, the defendant in this action, on the 27th day of February, 1884, paid to the Bank of Scotland, at London, £5,000 for account of Martin, Turner & Co. I produce for the inspection of the commissioner the original letter of advice, dated 27th February, 1884, from the Bank of British North America, of this city. This letter was accompanied by a cheque for £5,000 (five thousand pounds sterling) for credit of Martin, Turner & Co., and I hand to the commissioner, to be annexed hereto as an exhibit, marked —, an exact copy thereof. This payment was made by their (the Bank of British North America) cheque on Glyn, Mills & Co., bankers, of this city, payable to bearer, as is the
80 custom in this city in such transactions. I am unable to produce a copy of the cheque, as it passed out of the possession of the Bank of Scotland on presentation for payment. The £5,000 was credited to Martin, Turner & Co.'s account with the London branch of the Bank of Scotland. No payments were made from the said account subsequent to the receipt of the said sum of £5,000. It was included in the credit balance of Martin, Turner & Co. with the London branch of the Bank of Scotland and which amounted to £8,039 7 4 on the 27th day of February, 1884. This sum was, on the 7th of March, 1884, transferred to Martin, Turner & Co.'s account with the Glasgow branch of the Bank of Scotland. On the night of the 26th day of February, 1884, the credit balance of Martin, Turner & Co. with the London branch of the Bank of Scotland was £3,594 7 4. No sum was credited to Martin, Turner & Co. with the London branch of the Bank of Scotland on the 27th, 28th, and 29th of February, 1884, except the £5,000 hereinbefore mentioned, nor were any sums credited subsequently to the 27th February, 1884, and the account was closed on the 7th day of March, 1884, by the transfer of the balance to the Glasgow branch of the Bank of Scotland. On the evening of the 25th day of February, 1884, the credit balance in favor of Martin, Turner & Co. with the London branch of the Bank of Scotland was £39 7 4 (thirty-nine pounds seven shillings and four pence sterling).
81 On the 27th day of February, 1884, a cheque was paid to Martin, Turner & Co. amounting to £555. There were no other debits whatever on the 27th, 28th, and 29th days of February, 1884. The account was closed, as before stated, on the 7th day of March, 1884.

I hand to the commissioner, to be annexed thereto as an exhibit, marked "copy of account of Martin, Turner & Co. with the London

branch of the Bank of Scotland from February 26th, 1884, to the closing of such account."

Q. Was the Bank of Scotland or any of its officers advised that the £5,000 was to be credited Martin, Turner & Co. for account of W. B. Cooper, Jr., the plaintiff in this action, or was the Bank of Scotland or any of its officers advised that the money had been remitted to the Bank of British North America by W. B. Cooper, Jr.?

A. No such advice was given to any one connected with the London branch of the Bank of Scotland. The Bank of British North America, in making payment of such £5,000 to the Bank of Scotland, did not state that the same was for Martin, Turner & Co., account W. B. Cooper, Jr.

EXHIBIT "A."

THE BANK OF BRITISH NORTH AMERICA,
LONDON, E. C., 27 *Feb.*, 1884.

Bank of Scotland, Lothbury, E. C.

GENT'N: In accordance with instructions received this
82 morning from our New York ag'ts by telegram, I beg to enclose this bank's cheque for £5,000 (five thousand pounds) for credit of Martin, Turner & Co., Glasgow, receipt of which please own.

I am your obed't servant,
(Signed) A. G. WALLIS, *Secretary.*

EXHIBIT "B."

Messrs. Martin, Turner & Co., 142 St. Vincent street, Glasgow, in account with the Bank of Scotland, London.

1884.							
Feb. 21.	By balance		39 7 4	Cr.		39 7 4
" 26.	" C. B. of I. A. & C.	3,000		"		3,039 7 4
" 26.	" I. Goodair & Co.	555		"		3,594 7 4
" 27.	To selves	555		"		3,039 7 4
" 27.	By B'k of B. N. A.	5,000		"		8,039 7 4
M'h 7.	To transferred to B. of S., Glasgow, as on 6th March	8,039 7 4				
		£8,594 7 4				8,594 7 4

Plaintiff here rested.

83 Mr. Nash opens the cash for the defendant, and thereupon, to maintain the issues on its part, called WILLIAM B. COOPER, Jr., as a witness for the defendant, who testified as follows:

Q. Did you on the 25th, 26th, or 27th of February, 1884, send any message, by cable or otherwise, to Martin, Turner & Co. in respect to these remittances?

A. I may have done so.

Q. Please produce it.

A. I haven't got it. I think I did, but I don't know whether it is among Mr. Bowers' papers or not.

Mr. NASH: Will you look over your papers? There are a great many papers here, and if you find any we will put them in evidence before the case is closed. I call upon you as a witness now to produce any telegram or instructions to Martin, Turner & Co. in reference to this cable remittance of five thousand pounds.

Cross-examined by plaintiff's counsel:

Q. At the time of the failure of Martin, Turner & Co. were they indebted to you?

A. They were; about sixty thousand dollars; portions of it I have collected from time to time. They remain indebted to me, I should think, from forty to fifty thousand dollars.

The defendant, further to maintain the issues on its part,
84 called DUNCAN ARCHIBALD MCTAVISH as a witness for the defendant, who testified as follows:

I am one of the agents in this city for the Bank of British North America.

The home office is 3 Clement Lane, Lombard street, London.

It is an English corporation.

I had, on behalf of the bank, been in the habit to some extent of buying bills drawn by the plaintiff in this action upon Martin, Turner & Co., of Glasgow.

Those bills were virtually accepted in having a credit from Martin, Turner & Co. to authorize Mr. Cooper to draw them. They were not accepted upon the face of the bills, but when we bought them Mr. Cooper showed us his authority to draw, a letter of credit, and thereupon we bought the bills from time to time. We did not buy and had no interest in the bill of five thousand pounds which has been spoken of in this case as drawn by him and accepted by Martin, Turner & Co., maturing on the 29th of February.

Q. Now, on the 24th of March, 1884, Mr. Cooper addressed a letter to you on the subject of cable transfer, which you sold on the 26th of February, and I want to call your attention to that transaction. I show you Defendant's Exhibit "A," and I want you
85 to state now all that you recollect as to what occurred between you and Mr. Cooper in the office of the Bank of British North America at the time of the transaction. Now, what took place at the time of the negotiation for that transfer?

A. My recollection is that Mr. Cooper came in, and he told me that he required a cable transfer to remit as usual to his correspondents, Martin, Turner & Co., as was usually the case with us when we always send a cable transfer to Martin, Turner & Co. Nothing whatever was said at that time in reference to any particular object of the transfer, and no stipulation whatever was made in reference to any special mode of transfer. Nothing was said as to the purpose for which he wanted to transfer this five thousand pounds, nor was there any allusion made about transmitting to take up any bill drawn by him which was maturing about that time.

Nothing was said in reference to his desire that it should go by mail from London to Glasgow.

At the time of this transaction we had been in the habit of using, on behalf of Mr. Cooper, a cipher word for his message. That cipher word was explained to Mr. Cooper. I think Mr. Stikeman explained orally so that he understood the terms of the cipher. The cipher word which was used for the purpose of transmitting that message transmitted the order just as it is entered here.

86 Mr. Cooper sent in a check for the amount of the cable transfer that same day, I believe. After he had taken the order away with him the check was sent back by a messenger.

Q. Did you have any notice from Mr. Cooper on the subject prior to the letter, Exhibit No. 2, dated on the 24th of March, nearly a month following, which I now show you?

A. If there was any other communication than this I never saw it. I do not remember any prior communication. I don't believe there was any.

We must have heard before the 24th of March of the failure of Martin, Turner & Co., because our head office in London telegraphs the failure of all houses of importance when they occur. We received the communication at some time shortly after the failure of the fact of their failure, but I have no recollection of a communication from Mr. Cooper in reference to this cable transfer prior to that letter. The two-dollar item in that order is the cost of transmitting the message by cable; that is the cost of this cipher word. It is translated in a book, of which we hold one and our head office holds a duplicate.

Q. Now, how many code words do you remember to have had in reference to the business of Mr. Cooper?

A. I think there were only two—two, I believe. The first was registered on 2nd of September, 1882. It reads, "Martin, Turner & Company, Glasgow, on account W. B. Cooper, Jr."

87 Q. That is exactly like the one which was used on the 26th of February, was it?

A. Yes; that is it.

Q. Now, you have another, which was registered when?

A. The second one was registered the 27th of November, 1883. It reads, "Martin, Turner & Company, 3 Market buildings, 29 Mincing Lane, on account W. B. Cooper, Jr." Neither would communicate any information or instructions in reference to the retiring or renewing or providing for any bills of exchange maturing at any date. An instruction to pay or retire or take up a bill of exchange maturing at any particular time with funds which were deposited with us at New York would require a longer message than either of these. We had in our code words which would indicate those instructions. We were never in our dealings with Mr. Cooper instructed to send such messages to retire special bills of exchange of that kind.

By the COURT:

Q. I don't know whether you answered that Mr. Cooper knew of these cable words. You answered in reference to one of them.

A. He knew the interpretation of the code words, because he was consulted prior to the words being registered in our London office.

Cross-examined by plaintiff's counsel:

He didn't know the word, but he knew the translation.

It is a fact that I for a year or two prior to the 26th of February, I representing the Bank of British North America, had been
88 in the habit frequently of purchasing bills of exchange drawn by Mr. Cooper on Martin, Turner & Co., and during that period we frequently sold him other bills of exchange. He frequently during that period made cable transfers through us to Martin, Turner & Co.

It is not a fact that I knew that his purpose in making these cable transfers to Martin, Turner & Co. was to take up drafts that he had drawn on Martin, Turner & Co.

That was never brought to my attention. I never had any discussion of that kind. I knew nothing whatever as to that fact; nothing than that he was the representative of Martin, Turner & Co., selling property for them and remitting the proceeds of that property to them.

I knew that the general course of business was that the bills of lading were issued at the Philippine Islands, Hong Kong, and other points of exportation; that on those bills of lading Martin, Turner & Co. obtained advances; that these bills came here to the banks making the advances, some to the Canadian Bank of Commerce; that they were the owners of those goods, and that Mr. Cooper only received possession of them by giving his receipts to those banks.

I do not recollect the circumstances under which this first code word was arranged further than that we have code words
89 with numerous merchants here in the city, and they tell us how they wish their remittances to be sent forward.

One word represented the entire cable transfer, "Martin, Turner & Company, Glasgow." It represents "Martin, Turner & Company, Glasgow, account of W. B. Cooper, Jr." The two dollars was to cover the amount of transmitting the message, and it was intended to accurately represent it. The price was in the rate of exchange we charged.

The first cable he arranged with me was Martin, Turner & Company, Glasgow.

The use of the expression "Martin, Turner & Company, Glasgow, on account of William B. Cooper, Jr.," conveys some meaning to my mind.

We had blank orders, which at times were signed by Mr. Cooper when we sent those cable transfers for him. The blank orders were not always signed. We assented to them merely.

On the occasion of this particular transaction, on the 26th of February, I have presented here the paper which I call an order. It

was made out at the time while Mr. Cooper was in the office, but it was not signed by Mr. Cooper. It was made out by one of the clerks and was intended to represent exactly my understanding of the transaction. This was a blank prepared in our office.

90 It is headed "An order for cable transfer." The first blank is the date that was filled in—"26th of February, 1884." It is addressed "To the agents of the Bank of British North America, 52 Wall street." We have printed there "transfer by cable to" opposite. It was intended to fill in the name of the transferee, generally to whomever the money is to be sent. I intended the word "London" should go opposite the printed words "transfer by cable to." I am not in error. I use them every day and frequently during the day. My understanding was that opposite the words "transfer by cable to" should go the word "London" in all cases if they are filled in correctly. I can't tell why we did not print that word in. These were the forms we had. This was simply a copy of our form for bills of exchange, excepting that this had "order for cable transfer" on top of it. The next printed word is "addressed." I intended to have filled in opposite the word "addressed" both the name and address of the party. After the words "on account of" would be the name of the party who employed us to send the cable and the amount, whatever it was. This order was filled in at our place. Instead of filling in "London" opposite the blank "transfer by cable to" we filled in "Martin, Turner & Company." That was our own act. It was not my act. It was the act of our young man who had charge of making out these statements.

91 Q. Now, one thing is certain, either you intended to fill in after the words "transfer by cable to" either the place or the name of the person?

A. The reason we left that out was because we always transferred to London. We don't transfer anywhere else.

Q. Do I understand you or not that opposite the words "transfer by cable to" was intended to be filled in the word "London?"

A. I think that is the case.

Q. Then it was the fact that in every one of these orders instead of being "London" the name of Martin, Turner & Company is filled in?

A. Yes; it was because Mr. Cooper knew that the money was always transferred by us to London.

Q. You were aware that the money that Mr. Cooper intended to send was sent for his account to Martin, Turner & Company, Glasgow?

A. No; I believe it was sent to Martin, Turner & Company.

Q. You knew he was sending the money?

A. I knew he was sending the money, but I knew he was only their agent here.

Q. You knew a great deal about his business?

A. Well, I knew his business.

Q. You knew, in the first place, that he wanted to send money to Martin, Turner & Company?

A. Yes.

Q. You knew, did you not, that he selected as the address of Martin, Turner & Co. the word "Glasgow?"

A. Certainly.

Q. You knew that there was such a city?

92 A. Yes; I did. I knew that, whether he was paying Martin, Turner & Co. money or remitting them money or sending it for his own credit, whatever the purpose was, that the money he was sending was being sent by him to them. He gave us the money for them, and that, I presume, conveyed to me knowledge that in some form or other it was his money being sent to them, either to pay money or for some other purpose. We also had a second cipher for Mr. Cooper, by which we were able to remit money to Martin, Turner and Co., at London. It appears from the cable transfer that I knew that for some cause or other he chose in some cases to make his remittances to that firm at Glasgow and in some cases to that firm in London. Upon one occasion we telegraphed the money up instead of sending by mail, I believe. I knew that in that way, if it would not go there a day quicker than if it went in the ordinary course of mail, it would get there some hours quicker, at all events. I believe we had a word for that also. We didn't change the cipher word. We put another word in. When we sent a telegraph that way it represented Martin, Turner & Company, Glasgow, and when we sent another cipher it represented Martin, Turner & Company, London. In telegraphing to Glasgow we used the first one of these ciphers, merely adding a word, and that was pretty good notice to me that that money was to be paid to them at Glasgow. I

93 remember Mr. Walker, sworn here as a witness yesterday. I heard him state a conversation in reference to a transaction in which I hesitated to take a bill from him. It has not passed from my mind. I don't exactly recollect what he stated in regard to that, but my impression in regard to it was that he was incorrect. I have no recollection of any such conversation. I recollect no conversation with Mr. Cooper with reference to these bills prior to the failure of Martin, Turner & Company, though there have been since. I have no recollection of any conversation with Mr. Cooper and Mr. Walker during those two years by which I was given to understand that these cable remittances being made by Mr. Cooper were being made to take up drafts drawn by him on Martin, Turner & Co.

Q. I also understand that the first you knew that Mr. Cooper made any claim was by the letter of the 24th of March?

A. I had no notice whatever before.

Q. When Martin, Turner & Co. failed that fact was cabled by your correspondent on the other side. Is that so?

A. I believe so; I believe it was so.

Q. Have you any recollection of any conversation that ever occurred between you and Mr. Walker concerning the sale of drafts to you drawn by Mr. Cooper on Martin, Turner & Co. or the purchase of cable transfers from you?

A. I don't know that I have any definite recollection with regard to that, but I have a distinct recollection that he did not state to me

what he said yesterday—that that bill was to take up the acceptances——

94 Q. Have you any recollection of any conversation that you ever had with Mr. Cooper concerning the drawing of drafts by you on Martin, Turner & Co. or the purchase of cable transfers from you?

A. I don't know that I have any definite recollection about anything, excepting if Mr. Cooper will state what he has to say with regard to it, I will say whether it is so or not; that is all.

Q. You have no affirmative recollection of any conversation had with either of these gentlemen?

A. Nothing further than occurs every day in the purchase of cable transfers or in the sale of cable transfers or purchasing bills; nothing.

Q. Do you deny that they had the conversations with you that they have testified to?

A. I deny positively that they said that that cable transfer was for the purpose of taking up a bill; positively.

Q. What is the difference, in your mind, between not recollecting a conversation and being prepared with full force to deny that a conversation ever took place?

A. Because I know in one instance—it was never brought forward in the case of Mr. Cooper as to sending cable transfers to take up bills that I know of.

Q. Why should you be prepared to deny that with any more force than to deny Mr. Walker's statement that this five thousand pounds was changed to two and three thousand pounds?

A. I don't deny that.

95 Q. You don't recollect it?

A. No; I don't recollect it, because it is a matter of frequent occurrence.

Q. You don't recollect either conversation?

A. No; I do not.

Q. And that is as far as it is possible to go. You don't recollect that either occurred?

A. I don't recollect that that occurred. I might recollect it if I referred to our books.

Q. One you deny positively and the other you say might have occurred?

A. Yes.

Q. Is it the reason for that that one might have been in the course of business and frequently occurred and the other not?

A. Yes.

Q. Are you certain you have a very distinct recollection of these matters that were occurring at that time?

A. I think I have.

Q. Is it a fact that you charge a higher rate for a transfer where the transfer was to be made by telegraph from London to Glasgow than where it was not to be so made?

A. That is usual.

Redirect by defendant's counsel:

Q. Whatever the charge was would be in the rate of exchange, wouldn't it?

A. Yes.

Q. Had the defendants' bank any branch in Glasgow or elsewhere in Great Britain?

A. None, excepting London. London is its only place of business in Great Britain, so that a cable transfer bought of us to
96 be executed in the home office would require transmission in some other way if the party to whom the money was to be paid was not near London, either by mail or telegraph, and Mr. Cooper knew that. Mr. Stikeman is second agent, and he always makes the record of these cable transfers. He is next in authority to me.

By the COURT:

Q. Where you used the first cable word, how was the money transmitted to Martin, Turner & Co.?

A. It was transmitted by check usually until they sent their orders to our head office in London to pay the money for their accounts.

Mr. BOWERS: I object. I move to strike out that answer. It wasn't admitted yesterday.

Q. As far as you know, how was it transmitted?

A. From the time they sent us this order we obeyed the order.

Q. Had you any knowledge about it?

A. Oh, yes; our London office sent us out a copy of their letter.

By Mr. BOWERS:

—. They didn't send it to you until after this failure?

A. No.

By the COURT:

Q. When you used the first of these cable words was there any understanding between you and Mr. Cooper as to the way in which the money should be transmitted to Martin, Turner & Company?

A. There was a distinct understanding. It was to be transmitted to Martin, Turner & Co., Glasgow, by check from London
97 always until—or to their office in London—until this order came, when it was paid over by them to the Bank of Scotland in order to save Martin, Turner & Co. the inconvenience and save interest.

Q. You say that was understood by Mr. Cooper. How?

A. Understood, because we didn't make any extra charge. We sent it at lower rates.

Q. How did he know whether it was paid by check sent through the mail or by bills sent by express or various other ways?

A. If we sent it by wire to Glasgow we always charged about a sixteenth of one per cent. extra, because it costs us more.

Q. How did he know of the process by which you got the money from London to Glasgow unless by some conversation you had with him?

A. He must have known by the rate we charged for the bill, because we charged an extra rate.

Q. How was the check—the check drawn by your office?

A. The check drawn by our office to their bank in London, Glyn, Mills & Company.

Q. To the order of Martin, Turner & Company?

A. To the order of Martin, Turner & Company.

By Mr. NASH:

Q. If there was any conversation which you remember which took place between you and Mr. Cooper at the time you were
98 arranging this first code word in reference to the mode in which you would ordinarily, unless otherwise directed, remit the money from London to Glasgow, just state what that conversation was, if any took place at the time you were arranging the code word.

A. I think the conversation was that in the event of its going by check to Glasgow we gave it to him at our lowest cable transfer rate; if it went by wire, then we should charge him one-sixteenth extra. That is all that took place. If it went by wire, which would get the money to Martin, Turner & Co. a little earlier, then he would have to pay a little extra rate, and that was all that took place on the subject, so far as I recollect.

Q. I show you the order for a cable transfer which was put in evidence yesterday as Plaintiff's Exhibit 13. Will you see if any part of it is filled up in your office, or whether the filling up comes from Mr. Cooper's office?

A. I think it is filled in our office, excepting the signature, and then these figures here. I don't know what that stands for.

Q. The figuring up is in the handwriting of some clerk in your office?

A. I think so; yes, sir.

Mr. NASH: I want to move to strike out all the oral testimony of the plaintiff, and, of course, it follows all the oral testimony on the part of the defendants as to what took place at the time of the giving of the order for this cable transfer, on the ground that the transaction is in writing and cannot be varied by parole evidence.

99 By Mr. BOWERS:

Q. Then it was a fact that, at the commencement, Mr. Cooper was informed that the money would be transferred by mail to Martin, Turner & Co., Glasgow, from London?

A. I have no doubt it was so, and if he wanted it sent by telegraph he would have to pay a higher rate, which he did in one instance. I don't think we knew—I don't know for certain that we knew—until after the plaintiff's letter of April 24th giving the details of this claim that the house on the other side had any such

instructions as they now claim to have from Martin, Turner & Co. If we had known it I don't know that we should have told Mr. Cooper that we were paying all this money in London.

The defendant further, to maintain the issues on its part, read a portion of the testimony of Thomas Hinton Campbell, which was taken on commission by the plaintiff, one of the members of the firm of Martin, Turner & Co. Mr. Martin's deposition was read yesterday by the plaintiff's counsel.

My name is Thomas Hinton Campbell. I am temporarily residing at The Hermitage, St. Peter's Port, Guernsey. I have at present no occupation, but until the 29th of February, 1884, I was a partner in the firm of Martin, Turner & Co., merchants, of Glasgow. I know William B. Cooper, the plaintiff, personally, and I know the institution called the Bank of British North America.
100 William B. Cooper was the agent of my firm at New York, and also acted for my firm elsewhere in the United States. Cooper sent orders to our Eastern branches for sugars and other produce on account of refiners and others in America. He executed the orders of our Eastern firms for petroleum; he also received consignments of produce from the East for account of my firm. The only intercourse my firm had with the Bank of British North America was in relation to certain bills Cooper had occasion to draw on my firm which he had negotiated through that bank. On the morning of the 29th February, 1884, my firm received their annual balance-sheet from Batavia showing that a very heavy loss had not been provided for, and that we would suffer much more seriously than we had up to that moment anticipated, and we thereupon decided to at once suspend payment. The question of going into bankruptcy had not then arisen. We suspended payment on the 29th February, 1884. I do not recollect the exact day we went into bankruptcy, but I believe it was on the 7th March, 1884. Our offices remained open to answer inquiries; the doors were not closed. No new business was transacted after the 29th February, 1884. All moneys received by my firm at Glasgow on the 28th day of February, 1884, were treated in the usual way, as may be seen on reference to the books of my late firm.

Q. Do you know whether William B. Cooper, Jr., the plaintiff, on the 26th of February, 1884, remitted to your firm, through
101 the Bank of British North America, the defendant in this action, £5,000?

A. Yes; to the best of my knowledge and belief, he did.

Q. If such £5,000 had been received by your firm on the morning of the 28th February, 1884, what would have been done with the same?

A. It would have been used to protect Mr. Cooper's interest.

Q. Would it have been applied in payment of the draft drawn on you by said Cooper, maturing 29th February, 1884?

A. Yes.

Q. Would the said £5,000, if received by your firm on the morn-

ing of February 28th, have been given to your assignee or trustee in bankruptcy?

A. Probably it would have been, but in any case Mr. Cooper's interest would have been guarded. We should have endeavored to have had it used for the specific purpose for which it was intended.

Q. Were any other sums received by your firm from any source on the morning of the 28th February, 1884?

A. At this lapse of time I cannot positively say. I should think we did.

Q. Were any sums so received for a specific purpose. Were they so applied?

A. I now recall to mind that a remittance was received by my firm on the 28th February, 1884, for a specific purpose and was so applied.

Q. Do you know what became of the £5,000 remitted you
102 by the plaintiff through the defendant on the 26th of February, 1884?

A. As advised by letter and telegram of the 27th February, 1884, from the Bank of British North America, London, I assume it was paid to the credit of my firm with the Bank of Scotland, London.

Q. Was it paid to your credit to the Bank of Scotland, at London, by the defendant on the 27th of February, 1884?

A. I assume it was.

Q. What became of it?

A. As my firm were indebted to the Bank of Scotland to a considerable extent, I suppose they retained this sum to lessen their loss.

The following letter was written on the day of its date to the Bank of British North America, and most probably was signed by me:

(Copy.)

Ack'd 4th. The Bank of British North America, July 4, '83. No. 11725. 8 Clements Lane, London, E. D.

142 St. Vincent Street, Glasgow, *3rd July*, 1883.

The Bank of British North America, Lombard street, London.

Dear Sirs: We are favored with yours of yesterday and note the contents.

103 The amount £2,000 has been paid to us to-day by National Bank here, conformably with your advice, for which we are much obliged.

In the future please pay all transfers of monies from Mr. Cooper, New York, to the cr. of our account with the Bank of Scotland, Lothbury, London, kindly advising us of same by telegram when paid, and kindly do so until advised to the contrary.

We are, dear sirs, your ob't servants,

MARTIN, TURNER & CO.

As far as my memory serves me, this letter was never revoked.

(Copy.)

142 St. Vincent Street, Glasgow, 27 *Feb.*, 1884.

Bank of British North America, London.

Dear Sirs: We have your telegram of date advising payment to our credit with Bank of Scotland of £5,000 from New York on ac. Mr. Cooper, for which we thank you. Enclosing stamps (1 | -) to reimburse your outlay,

We are, dear sirs, yours faithfully,

MARTIN, TURNER & CO.

104 The defendant, further to maintain the issues on its part, called William B. Cooper, Jr., the plaintiff, as a witness for the defendant, who testified as follows:

Q. Have you any cablegrams or any draft or copy of a cablegram which you sent to Martin, Turner & Company on or about the 26th of February?

A. I have a copy here of the whole of it. This copy was made when the cable was sent, within a day or two of the 26th of February, 1884: "To Glasgow, 26th of February, 1884. Have remitted since last advices five thousand pounds, Bank of British North America; will remit four thousand 28th of February. Sugar market is extremely dull."

That is the whole of the dispatch. I had before then notified Martin, Turner & Co. of the remittance of this money otherwise than by that cable.

Defendant here rested.

It is admitted that the value of the five thousand pounds as of the 29th day of February, 1884, was the amount paid for the cable transfer, $24,527, and that the interest thereon to this date is $3,975.56, making in all $28,502.56.

The testimony was here closed.

105 Whereupon the counsel for the defendant moved to strike from the case the parole evidence tending to affect a legal construction of the papers, Exhibit 1 and Exhibit A, upon the ground that they are in writting and they are the best evidence of what the transaction was. The order of cable transfer is Exhibit A. That appears to have been delivered to Mr. Cooper at the time he applied for the transfer. He took it with him and sent a check for the amount, and received on the same day the following bill. (Counsel reads the bill.) Those two papers, we suppose, represent the transaction, and, of course, there is some conflict of testimony between the plaintiff and Mr. McTavish as to what took place on that occasion. We suppose that if that testimony is removed from the case that that conflict does not continue. I therefore make that motion.

But the said judge refused to strike from the case the said evidence and denied said motion, and to such refusal and denial the counsel

for the said defendant did then and there on behalf of the said defendant except.

Whereupon the counsel for the defendant moved the court to direct a verdict in favor of the defendants in this case, upon the grounds that under no aspect of the case was there any such specific appropriation as between the sender of this money and the person who was to receive it as to change the attitude of the parties in reference to the insolvency which ensued to Martin, Turner &
106 Company and the bankruptcy which followed the contract.

But the said judge refused to direct a verdict in favor of the defendant and denied said motion, and to such refusal and denial the counsel for the said defendant did then and there on behalf of the said defendant except.

Whereupon the counsel for the defendant requested the said judge to instruct and charge the jury to disregard all oral evidence to vary or modify the transaction of the 26th of February, 1884, as represented by the order and receipt.

But the said judge refused so to instruct and charge the jury as requested, and to such refusal the counsel for the defendant did then and there on behalf of the said defendant except.

Whereupon the counsel for the defendant requested the said judge to charge and instruct the jury that Martin, Turner & Co., acceptors of the bill falling due on the 29th of February, 1884, were primarily liable for its payment and liable to the holder, whether put in funds by the drawer or not; and, being so liable, the money remitted by the plaintiff became their money as soon as it came under their control and then ceased to be his.

But the said judge refused so to charge and instruct the jury as requested, and to such refusal the counsel for the defendant did then and there on behalf of said defendant except.

107 Whereupon the counsel for the defendant summed up the case for the defendant, and then the counsel for the plaintiff summed up the case for the plaintiff.

And the said judge did then and there charge the said jury, and of said charge the material parts are as follows:

GENTLEMEN OF THE JURY: At the time of this transaction, in the spring of 1884, the plaintiff was engaged in business as a commission merchant in this city. The defendant, a British corporation, had its home office in the city of London and a branch office in this city. The firm of Martin, Turner & Company were engaged at Glasgow, Scotland, in the East Indian trade, that being their home office; they also had a London office, at 29 Mincing Lane, in that city. They transacted their business through the Bank of Scotland, that corporation also having a branch office in the city of London.

Upon the 14th day of December, 1883, the plaintiff, Mr. Cooper, having received a letter of credit from Martin, Turner & Co. permitting him so to do, drew a draft or bill of exchange upon the Glasgow firm of Martin, Turner & Company for five thousand pounds, payable to the order of himself and payable at the Bank of

Scotland, in the city of London. The draft was due on the 29th day of February, 1884; that included the days of grace.

108 On the 26th day of February the plaintiff went to the office of the defendants in this city and had a conversation with their agent, Mr. McTavish, the purport of which I will refer to hereafter, as I am only calling your attention now to what I understand to be the admitted facts. The result of that conversation was that he purchased a cable exchange for five thousand pounds, which was sent by the defendant that day to London. He received a bill for the cable exchange rendered to him by the defendants, which, so far as it is necessary to refer to it for the purpose of this case, is in the following language: "William B. Cooper, Jr., debtor to the agents of the Bank of British North America, 52 Wall street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Company, Glasgow, five thousand pounds;" carried out in American money, "$24,525; cost of cable, $2."

This cable transfer reached the defendants in London upon the 27th of February, 1884, the next day. It was paid upon that day to the Bank of Scotland, their branch office in the city of London, for the credit of Martin, Turner & Company, and at the time it was paid a telegraphic dispatch was sent by the defendants to Glasgow announcing to Martin, Turner & Company that at that moment they were paying to their credit to the Bank of Scotland the sum of five thousand pounds received from the plaintiff. At the same time, on the 27th, they wrote to the Glasgow firm a

109 letter of advice that the amount had been paid to their credit to the Bank of Scotland. That letter reached Glasgow on the morning of the 28th, and it seems to be undisputed that if a draft had been enclosed that also would have reached Glasgow upon the morning of the 28th.

The payment by the defendants to the Bank of Scotland was made pursuant to written instructions received by them from Martin, Turner & Company that whenever the plaintiff transmitted funds for their benefit from New York the defendants, The Bank of British North America, were to pay it to them by placing it to their credit in the London branch of the Bank of Scotland. Those instructions were given some time prior to the transactions in this case and had not been revoked at that time.

Upon the 28th, probably, the firm of Martin, Turner & Company, having received advices from their East Indian correspondents that they had made large losses which they had no funds to meet, became convinced that it was idle for them to continue longer in business, and upon the morning of the 29th they closed their doors. When the money was paid to the Bank of Scotland no specific instructions were given in regard to it, and a general credit was given to Martin, Turner & Company upon the books of the bank. As the firm was indebted to the bank to a considerable extent, the money was retained to lessen this indebtedness. The plaintiff received no benefit from it. It was not used to take up the draft, assum-

110 ing that it was sent specifically for that purpose.

So far there is no contest between these parties. It begins at

this point. The plaintiff insists that the money was lost to him by reason of the failure of the defendants to obey specific instructions given by him to them upon the 26th day of February, 1884. The defendant denies that any specific instructions were so given, and insists that the loss was the usual one which came to these parties and to other parties by reason of the suspension of Martin, Turner & Company upon the 29th of February.

As to the law which governs the case, very little, I think, need be said. As I understand it, and for the purposes of this trial I shall so hold, the transaction between these parties upon the 26th of February created the relations between them of principal and agent. The plaintiff had a right to prescribe the manner in which funds owned by him or sent by him should be transmitted to their destination, and if the defendants, knowing that they were his funds and knowing they were to be sent in a particular way, contracted with him for a consideration to do just that thing—to send them as he directed—and loss occurred by their failure to keep the agreement, then a foundation is laid for recovery. A specific agreement to do a specific thing in a particular way, understood and entered into by the parties, of course is not fulfilled by an attempt to do it in a different way which is not carried out. The defendants were
111 the agents of the plaintiff to transmit this money, and if they agreed to do it in a particular way it matters not whether it was the right way or whether it was the usual way or whether it was the proper way, provided it was the plaintiff's way and provided it was the way which all understood. If there was a specific agreement to transact this business in a particular manner, of course that contract must be carried out.

Applying the law to the facts in this case, I charge you that if Mr. McTavish knew that the money was Mr. Cooper's and it was sent to pay a draft of his, and Cooper directed McTavish to cable it to London and from thence to send it by mail to Glasgow and he agreed to do so—that is, McTavish agreed to do so—and failed to perform his agreement and delivered it to Martin, Turner & Company at London instead of Glasgow, by reason of which delivery the plaintiff sustained loss, the defendants are liable; and this is true even though it is urged that it might have been lost on the way to Glasgow or after reaching there, for the law cannot go into such subtleties and niceties and speculate as to the probable result if the instructions had been carried out. So, gentlemen, you will bear in mind that though this proposition is true, the converse is also true, and if there was no specific agreement; if Mr. McTavish did not know that this money was to be paid by Mr. Cooper for a specific purpose; if he did not know that it was Mr. Cooper's funds; if
112 he had a right to assume that it was the money of Martin, Turner & Company; in other words, if it was sent in the usual course of business without any specific instructions or without any specific agreement, then the plaintiff is not entitled to recover, and it was no deviation from the contract for the defendants to pay to the consignees in London as the consignees directed them to pay.

You will observe, gentlemen, that the plaintiff invokes a some-

what severe rule of law in order to maintain this action—that is, he alleges that the defendants should pay this large sum of money, for which they received no benefit except what they derived from commissions, because of their failure to fulfill the alleged agreement of the 26th; and therefore it is proper that you should bear in mind that in this case, as in all cases, the burden is upon the plaintiff to satisfy you by evidence which, in your judgment, outweighs the evidence produced by the defendants that the allegations of the complaint are correct; that the contract was made; that he has fulfilled it; that the defendants have failed to perform it. Bearing in mind, then, all the evidence in the case and all the presumptions which are to be drawn from it; bearing in mind the fact that Martin, Turner & Company suspended upon the 29th, and that no one upon this side of the water had any reason to suppose that there was to be a failure upon that day, except that Mr. Cooper, from conversations which he said he had with Mr. McTavish or which
113 Mr. Walker had with Mr. McTavish, though he had some reason to suppose that they might be in embarrassed circumstances, we come to the principal dispute in the case.

These parties met upon the 26th day of February. Upon that occasion Mr. Cooper says that he made an agreement with Mr. McTavish, in which he informed him that this money was to be sent to take up the draft; that it was his money, and he wished it cabled to London and sent from London to Glasgow by a check deposited in the mail. His evidence upon that subject is written out by the reporter, and is as follows:

"I went into the Bank of British North America on the 26th of February, 1884. I saw Mr. McTavish. He invited me inside the railing and asked me what he could do for me. I said I wanted to get a rate of cable transfer for five thousand pounds that I wished to send to my friends in Glasgow. He asked me whether I wished him to mail a check or to telegraph it through from London to Glasgow. He told me the rate was 490¾, which I thought was rather high, but finally we closed it, and I attempted to make out an order for the draft for particulars of how I wanted it sent, and he said that he would save me the trouble, as I was seated next to his desk, which was a circular one, and I couldn't write conveniently. I never saw the order or the memorandum he made out, but he told me the rate was 490¾, and he said he understood the check was to go by mail to Glasgow."

114 And, further, being asked to recapitulate that conversation or the substance of it, he says:

"I told him that he had hesitated some five or six weeks previous about taking a bill for five thousand pounds drawn on or about the 16th of January, 1884, and I wanted to tell him the character of the bill that I drew. These bills were drawn under a letter of credit of Martin, Turner & Co., and I wanted to explain to him that those bills would, in my opinion, be good under most any circumstances, because I always took up those bills at maturity, and these very cables that I had bought and was buying of him that day was to take up one of those five-thousand-pound bills. I told

him that at that time I thought he hesitated, and finally he did take the bill."

Well, gentlemen, that is the substance of Mr. Cooper's evidence, enlarged greatly upon cross-examination, upon this question. You will bear in mind that he says that he told Mr. McTavish that this was his money and was sent to take up a draft, and that he wished it sent from London by mail, and that Mr. McTavish agreed to do so. Upon the other side Mr. McTavish has been called, and he swore that he had no intimation whatever that this particular cable transfer was to be used for any particular purpose; that there was nothing whatever said about transmitting it from London to Glasgow by mail; nothing whatever said with reference to its purpose; nothing said whatever with reference to who owned the
115 funds; in fact, he said that he supposed they were owned by Martin, Turner & Company, and that their agent here, Mr. Cooper, was transmitting money which he had collected.

It is also contended that the theory which is now advanced was one thought of after the transactions. The letters of Mr. Cooper have been read in your presence, of which the defendant seeks to predicate that contention. In one of them, in substance, he asks Mr. McTavish what was his usual course with reference to sending funds from London to Glasgow, the argument being that if there had been a special agreement upon this occasion he would not have asked that question.

I do not know, gentlemen, that I can say anything further which will aid you. If this was a specific agreement, as the plaintiff says, and Mr. McTavish, with full knowledge of the circumstances, knowing that this was the plaintiff's money, that it was destined for a certain purpose, made the alleged agreement, it was his duty to carry it out; and if you find that he failed to do so with loss and injury to the plaintiff by reason thereof the plaintiff is entitled to recover.

If, on the contrary, you should find that it was an ordinary business transaction; that there was nothing to indicate to Mr. McTavish that the money was Mr. Cooper's; that there was no specific agreement made about it in any view, then the fact that after the money reached London it was paid in accordance with the instruc-
116 tions of the transferees, Martin, Turner & Company, would not be such a deviation as would entitle the plaintiff to recover.

Whereupon the counsel for the defendant did then and there except to the said judge's charge that if the specific agreement was made as alleged by Mr. Cooper, that then the plaintiff is entitled to recover the full amount claimed, and requested the said judge to charge that the payee to whom money is payable is entitled to control the mode of payment, provided he does nothing to delay or prevent payment or violates no express instructions of the party sending the money.

The COURT: I charge that.

And the said judge, under the charge and with the directions aforesaid, *inter alia*, left the aforesaid issues and the evidence as given on the trial to the said jury, and the said jury then and there gave a verdict for the plaintiff for the full amount, with interest, amounting in the whole to $28,502.56.

And inasmuch as none of the said exceptions so offered and made to the opinion and decision and charge of the said judge do appear upon the record of the said trial, therefore on the prayer of the said defendant, by its counsel, the said judge hath to this bill of exceptions, containing in substance the whole of the testimony
117 and evidence in said cause, put his signature and seal, according to the statute in such cases made and provided, at and during the term of this court aforesaid, to wit, at the October term of said court, A. D. 1886; and the said judge doth hereby order this said bill of exceptions be filed *nunc pro tunc* as of the 15th day of March, A. D. 1887.

ALFRED C. COXE.

The above bill of exceptions has been agreed upon and settled by and between us, and we hereby consent that it be ordered on file *nunc pro tunc* as of the 15th day of March, A. D. 1887.

PLATT & BOWERS,
Plaintiff's Attorneys.
NASH & KINGSFORD,
Defendant's Attorneys.

(Endorsed:) United States circuit court, southern district of New York. William B. Cooper, Jr., *vs.* The Bank of British North America. Bill of exceptions. Nash & Kingsford, def't's att'ys, 67 Wall street, N. Y. U. S. circuit court. Jul- 21, 1887. Timothy Griffith, clerk.

118 Supreme Court of the United States.

THE BANK OF BRITISH NORTH AMERICA *ag'st* WILLIAM B. COOPER, Jr. } Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiff in error, by Nash & Kingsfold, *their* attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing,

and that it, the said plaintiff, may be restored to all things which it has lost by occasion of said judgment, &c.

NASH & KINGSFORD,
Attorneys for Plaintiff in Error, 67 Wall Street, N. Y.

119 [Endorsed:] United States Supreme Court. The Bank of British North America, plaintiff in error, *vs.* William B. Cooper, Jr., defendant in error. Assignment of errors. Nash & Kingsford, att'ys for pl'ff in error, 67 Wall street, N. Y. Due service of a copy of the within assignment of errors is hereby admitted. N. Y., Aug. 12th, 1887. Platt & Bowers, att'ys for def't in error. U. S. circuit court. Filed Aug. 13, 1887. Timothy Griffith, clerk.

120 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

WILLIAM B. COOPER, JR.,
vs.
THE BANK OF BRITISH NORTH AMERICA. } Bond for Damages and Costs.

Know all men by these presents that we, The Bank of British North America, as principal, and Percy R. Pyne, of the city, county, and State of New York, and Horace Gray, of the same place, as sureties, are held and firmly bound unto the above-named William B. Cooper, Jr., in the sum of eight thousand dollars, to be paid to the said William B. Cooper, Jr.; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas the above-named Bank of British North America has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Bank of British North America shall prosecute such appeal to effect and answer all damages and costs if — fail to make — good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE BANK OF BRITISH N. AMERICA.
D. A. McTAVISH,
H. STIKEMAN, *Agents.*
PERCY R. PYNE. [L. S.]
HORACE GRAY. [L. S.]

Sealed and delivered and taken and acknowledged this 23 day of June, 1887, before me—

CHARLES L. JONES,
Notary Public, N. Y. Co.

121 [Endorsed:] Vol. —, page —. U. S. circuit court. William B. Cooper, Jr., *vs.* The Bank of British North America. Bond for damages & costs. Nash & Kingsford, def't's proctors, 67 Wall St., N. Y. city. Bond approved as to form and sufficiency of sureties. July 25, 1887. E. Henry Lacombe. U. S. circuit court. Filed July 25, 1887. Timothy Griffith, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Percy R. Pyne, being duly sworn, deposes and says that he resides at No. 25 East 22d street, city of New York; that he is a freeholder within the State of New York; that he is worth the sum of eighty thousand dollars over and above all his just debts and liabilities.

PERCY R. PYNE.

Sworn to this 23d day of June, A. D. 1887, before me—

CHAS. L. JONES,
Notary Public, N. Y. Co.

UNITED STATES OF AMERICA, *Southern District of New York, City and County of New York,* } *ss:*

Horace Gray, being duly sworn, deposes and says that he is a freeholder within the State of New York; that he is worth the sum of eighty thousand dollars over and above all his just debts and liabilities.

HORACE GRAY.

Sworn to this 28th day of June, 1887, before me—

CHARLES L. JONES,
Notary Public, N. Y. Co.

122 UNITED STATES OF AMERICA, *ss:*

To William B. Cooper, Junior:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Bank of British North America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected or reversed and speedy justice should not be done to the parties in that behalf.

Dated July 25, 1887.

E. HENRY LACOMBE.

123 [Endorsed:] U. S. Supreme Court. The Bank of British North America, plaintiff in error, against William B. Cooper, Junior, defendant in error. Citation. Nash & Kingsford, att'ys for pl't'ff in error, 67 Wall street. 25 p'd. Due service of a copy of the within citation is hereby admitted. July 26th, '87. Platt & Bowers, att'ys for defendant. U. S. circuit court. Filed Jul- 26, 1887. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 399. The Bank of British North America, plaintiff in error, *vs.* William B. Cooper, Jr. Filed September 14, 1887.

FILED
OCT 24 1890
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 103.

THE BANK OF BRITISH NORTH AMERICA,
Plaintiff in Error,

vs.

WILLIAM B. COOPER, JR.
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

STEPHEN P. NASH,
Counsel for Plaintiff in Error.

Evening Post Job Print, New York.

Supreme Court of the United States.

THE BANK OF BRITISH NORTH AMERICA,
Plaintiff in Error,

AGAINST

WILLIAM B. COOPER, Jr.,
Defendant in Error.

POINTS ON THE PART OF THE PLAINTIFF IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York, brought to review a judgment in favor of the plaintiff below entered upon the verdict of a jury. The following are the material facts in the case:

For some time prior to February, 1884, Cooper, the plaintiff below, had acted as agent in the United States for Martin, Turner & Co., of Glasgow, receiving consignments of produce for them and executing their orders. He had been in the habit of drawing, under letters of credit, bills of exchange upon them, payable in London or Glasgow, of selling such bills to bankers in New York, and of receiving and using the proceeds of them. It was his duty to Martin, Turner & Co. to protect their acceptances of these bills by remitting funds to meet them at maturity (*p.* 14, *fol.* 36).

A bill for £5,000 so drawn by plaintiff below and sold by him, and of which he had received the proceeds, had been accepted by Martin, Turner & Co., payable at the Bank of Scotland, in London (*p.* 25, *fol.* 58). This bill matured on the 29th of February, 1884. On the 26th of February, 1884, Cooper telegraphed to Martin, Turner & Co., at Glasgow, as follows:

"Have remitted since last advices five thousand pounds, "Bank of British North America; will remit four thou- "sand 28th February. Sugar Market dull" (*p.* 48, *fol.* 104).

The remittance referred to, was made through the defendant below, the Bank of British North America, as follows: On the 26th of February Cooper made an arrangement with the agent of the Bank in New York for the purchase of a cable transfer of £5,000, paying therefor $24,527. The bill for this transfer was produced by plaintiff, and is as follows:

"NEW YORK, 26th February, 1884.

"W. B. Cooper, Jr., Dr. To the Agents Bank of British "North America, 52 Wall street, for cable transfer on the "Bank of British North America, London, in favor of "Martin, Turner & Co., Glasgow, £5,000, at

"$4.90½	$24,525
"Cost of Cable	2
	"$24.527."

(*P.* 19, *fol.* 47).

The money was paid in due course by the Bank to Martin, Turner & Co., by sending its check to the London branch of the Bank of Scotland in London to their credit. The payment was made in this mode in obedience to a general letter of instructions which had been given to the bank by Martin, Turner & Co., the previous July, as follows (*p.* 47, *fol.* 103):

"In the future please pay all transfers of money from "Mr. Cooper, New York, to the cr. of our account with

" the Bank of Scotland, Lothbury, London, kindly ad-
" vising us of same by telegram when paid, and kindly do
" so until advised to the contrary."

" MARTIN, TURNER & Co."

Accordingly, on the 27th of February, on the receipt of the cable message from New York, the bank sent its check on Glynn, Mills & Co., bankers, for £5,000, to the Bank of Scotland in London, to the credit of Martin, Turner & Co. (see letter, *p.* 37, *fol.* 82), and on the same day telegraphed to Martin, Turner & Co. as follows:

" We are paying five thousand pounds to your credit
" with Bank of Scotland here from New York, account of
" Cooper. Please remit 1/5 for costs of telegram;"

and wrote them to the same effect, enclosing a copy of the telegram (*p.* 33, *fol.* 74), to which Martin, Turner & Co. replied by letter of the same day as follows:

" Bank of British North America, London:
" Dear Sirs,—We have your telegram of date, advising
" payment to our credit with Bank of Scotland of £5,000,
" from New York, on ac. Mr. Cooper, for which we
" thank you.
" Enclosing stamps (1/ —) to reimburse your outlay.
" We are, Dear Sirs, Yours faithfully,
" MARTIN, TURNER & Co."

(*P.* 48, *fol.* 104.)

The £5,000 was thus effectually paid to Martin, Turner & Co., and the mode of payment expressly approved by them ; but they suspended payment on the 28th or 29th of February (*p.* 33, *fol.* 74), and did not take up plaintiff's bill, drawn upon and accepted by them (*p.* 25, *fol.* 58), which matured on the 29th of February, and was payable at the Bank of Scotland in London, *where the money was*, and plaintiff has been charged as drawer of it. After some correspondence with defendant's agent in New York, plaintiff below concluded to charge the Bank of British North America with a breach of instructions as to mode of making payment to Martin, Turner & Co.,

claiming that he bought the cable transfer under an arrangement that the £5,000 was to be sent from London to Glasgow, by mail, in the form of a check; that in that case it would not have reached Martin, Turner & Co. till the 28th of February, and would have been available for the purpose for which the remittance was made; that is, to retire the bill of exchange maturing on the 29th. The allegation of the complaint is that the defendant below undertook to remit and pay over the five thousand pounds "to the firm of Martin, Turner & Co., at Glasgow, Scotland" (*p.* 3, *fol.* 7), and, in the second count, that the plaintiff below employed the defendant as his agent to remit the five thousand pounds to be paid "by draft to be sent *by mail to the firm of Martin, Turner & Co., at Glasgow*, Scotland, with notification that the same was so remitted for account of plaintiff" (*p.* 4, *fol.* 9).

The evidence to show the special instructions alleged in the complaint was oral testimony, except so far as the transaction was expressed by the bill rendered and receipted when the money was paid in New York for the cable transfer (*p.* 19, *fol.* 47). This testimony was principally that of the plaintiff below, who testified that Mr. McTavish, the agent of the defendant below, with whom the arrangement was made on the 26th of February, 1884, knew that the cable transfer was desired for the purpose of taking up a bill of five thousand pounds which was about maturing. At page 21, folio 50, he says that he told him it was to take up "some bill of exchange which I had drawn on Martin, Turner & Co.," but he did not state who held the bill, nor specify the date of maturity (*p.* 22, *fol.* 52). He did not say except casually, that he wanted the money sent by mail. "I said I wanted to purchase a cable transfer to be sent to my friends at Glasgow. I said nothing else at that time. He asked me whether I wanted it sent by mail or telegraph up to Glasgow. I told him I wanted it mailed. That was the conversation" (*p.* 22, *fol.* 53). It is not shown anywhere in the testimony that there were any specific instructions as to how the money was to be remitted other than

what is to be inferred from the course of businesss and from the language of the receipted bill (*p.* 19, *fol.* 47. The messages from the agent in New York to the bank in London were in cipher, and the cable words which had been arranged with Cooper, and generally used, represented the following phrases: "Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr.," and "Martin, Turner & Co., 3 Market Buildings, Mincing Lane, ac. W. B. Cooper, Jr." (*p.* 20, *fol.* 48). The word representing the first phrase was the one used on the occasion in question, and it is undoubtedly the fact that but for the general directions of Martin, Turner & Co. to pay remittances on account of Cooper into the London branch of the Bank of Scotland, the £5,000 in question would have been sent in a check by mail to Glasgow. There was a third case in which, when the plaintiff below was late in transmitting, he had the money telegraphed from London to Glasgow, but this involved an additional expense (*p.* 44, *fol.* 96).

There was no pretense of any suggestion made to the agent at New York, when the cable transfer was purchased, that it was desirable that the funds should reach Martin, Turner & Co. in the check of the bank, or that they should not reach Martin, Turner & Co. *before* the 27th or 28th, or that it was important that they should be advised by the bank of the purpose of the remittance. Being asked on cross-examination whether in the course of his dealings with the agent of the bank at New York he had ever suggested any message that should read: "Retire the acceptance or note maturing so and so," the plaintiff below disclaimed ever having given such instructions, and he also said distinctly that when he purchased the transfer, on the 26th of February, he did not suppose that Martin, Turner & Co. were about to fail. If he had he would not have sent the remittance at all (*p.* 22, *fol.* 52; *p.* 23, *fol.* 54). The contention, therefore, of the plaintiff below, that the form of the transaction, the address being Martin, Turner & Co., Glasgow, was, in effect, an instruction that

the money was to be specially transmitted to them there, and not elsewhere, was an afterthought. This is apparent from the correspondence he had with the bank when he was first feeling his way to make his claim. In his first letter, dated the 24th of March, 1887, he wrote: "I purchased from you on the 26th ultimo, a cable transfer for £5,000 on the Bank of British North America, London, with instructions to pay same to Martin, Turner & Co., Glasgow, for my account" (*p.* 16, *fol.* 41.) This had been done, and the language used in this letter corresponds with the language of the original receipted bill (*p.* 19, *fol.* 47), and with the cable as sent "Martin, Turner & Co., Glasgow, £5,000, ac. W. B. Cooper, Jr." (*p.* 17, *fol.* 42). But after having been to England and after taking advice of counsel, he rehearsed the transaction more in detail by his letter of the 24th of April, 1884, a month later, and wrote (*p.* 17, *fol.* 43): "On that date I purchased from you a cable transfer for five thousand pounds, which I instructed you to remit to Martin, Turner & Co., *at* Glasgow, for my account." This is the first occasion in which the word "at" was introduced into any of the documents connected with the transaction, and at *page* 21, *folio* 50, Cooper substantially admitted that in dictating the letter he directed the word "at" to be inserted.

While the trial was in progress counsel for the defendant below raised the point that the transaction connected with the purchase of the cable transfer was in writing, and could not be varied by parol evidence (*p.* 45, *fols.* 98-9), and at the close of the testimony moved to strike out all the oral evidence to vary the construction of the order given for the transfer (*p.* 28, *fol.* 65), and the bill rendered for the price (*p.* 19, *fol.* 46). This motion was denied and an exception taken. The defendant below then moved the Court to direct a verdict in favor of the defendant, which motion was also denied and an exception taken (*p.* 49, *fol.* 106). The defendant below also requested the judge to instruct the jury to disregard all oral evidence to vary the transaction of the 26th of February, 1884, as represented by the order and receipt. The Court refused such in-

struction, and the defendant excepted (*ib.*). Counsel for the defendant also requested the Court to instruct the jury "that Martin, Turner & Co., acceptors of the bill falling due on the 29th of February, 1884, were primarily liable for its payment, and liable to the holder, whether put in funds by the drawer or not; and being so liable, the money remitted by the plaintiff became their money as soon as it came under their control, and then ceased to be his." This instruction was refused, and the defendant below excepted (*p.* 49, *fol.* 106). The Court left it to the jury to say whether, upon the conflicting testimony, there was an agreement upon the part of the bank to send the money *by mail* from London for the specific purpose of taking up the bill of exchange about to mature, and that, if so, the bank was liable, instructing the jury as follows:

"If McTavish knew that the money was Mr. Cooper's, and it was sent to pay a draft of his, and Cooper directed McTavish to cable it to London and from thence to send it by mail to Glasgow, and he agreed to do so and failed to perform his agreement and delivered it to Martin, Turner & Co., at London, instead of Glasgow, by reason of which delivery the plaintiff sustained loss, the defendants are liable" (*p.* 51, *fol.* 111). And again: "If this was a specific agreement, as the plaintiff says, and Mr. McTavish with full knowledge of the circumstances, knowing that this was the plaintiff's money, that it was destined for a certain purpose, made the alleged agreement, it was his duty to carry it out; and if you find that he failed to do so with loss and injury to the plaintiff by reason thereof, the plaintiff is entitled to recover" (*p.* 53, *fol.* 115). And as to the loss: And if by reason of the delivery at London instead of Glasgow, "by reason of which delivery the plaintiff sustained loss, the defendants are liable, and this is true even though it is urged that it might have been lost on the way or after reaching there, for the law cannot speculate as to the probable result if the instructions had been carried out" (*p.* 51, *fol.* 111). "The plaintiff invokes a somewhat severe rule of law in order to maintain this

action; that is, he alleges that the defendants should pay this large sum of money, for which they received no benefit, except what they derived from commissions, because of their failure to fulfill the alleged agreement of the 26th" (*pp.* 51, 52, *fol.* 112).

The defendant below excepted to the charge "that if the specific agreement was made as alleged by Mr. Cooper, that then the plaintiff is entitled to recover the full amount claimed" (*p.* 53, *fol.* 116).

And also requested the judge to charge "that the payee to whom money is payable is entitled to control the mode of payment, provided he does nothing to delay or prevent payment, or violates no express instructions of the party sending the money." The Judge responded: "I charge that" (*ib.*), a direction which it is submitted ought logically to have led to a direction to find for the defendant.

The jury found a verdict for $28,502.26, the amount claimed, with interest.

At pages 10–12 is a statement which strictly forms no part of the record. It is the statement of the learned judge upon which follows his opinion given on denying a motion for a new trial (*p.* 12).

The assignment of errors as required by Section 997, R. S., is at page 54, and the plaintiff in error makes the following specification of the errors relied upon for a reversal of the judgment.

First.—To the refusal to strike out all the oral testimony tending to affect the legal construction of the papers at *pp.* 19 and 28, as requested at *p.* 48, *fol.* 105.

Second.—To the refusal of the Court to direct a verdict for the defendants, as requested at *p.* 49.

Third.—To the refusal of the Court to instruct the jury to disregard the oral evidence given to vary or modify the construction of the papers just referred to (*p.* 49, *fol.* 106).

Fourth.—To the refusal of the Court to instruct the jury that the money remitted by the plaintiff below be-

came the money of Martin, Turner & Co. as soon as it came under their control, and ceased to be his (*p.* 49, *fol.* 106).

FIFTH.—To the following instruction, based upon the oral testimony: "If this was a specific agreement, as the plaintiff says, and Mr. McTavish, with full knowledge of the circumstances, knowing that this was the plaintiff's money, that it was destined for a certain purpose, made the alleged agreement, it was his duty to carry it out, and if you find that he failed to do so, with loss and injury to the plaintiff by reason thereof, the plaintiff is entitled to recover" (*p.* 53, *fol.* 115; exception, *fol.* 116).

POINTS.

First.—There was no such special contract made at the time of the purchase of the cable transfer, nor any such explicit instructions given to the agent of the bank as would make it liable for not paying the money to Martin, Turner & Co. in the precise manner, at Glasgow, in which the plaintiff below claimed that it ought to have been paid.

The contract, as evidenced by the writing, was to pay to Martin, Turner & Co., Glasgow, on account of Cooper (*p.* 19, *fol.* 467). The message cabled was by a cipher, which represented the following phrase: "Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr." (*p.* 20, *fol.* 48), and the cipher was one which had been arranged to be used by Cooper and the agent of the bank in doing this kind of business (*p.* 22, *fol.* 52; *p.* 20, *fol.* 47).

It is quite apparent that as the parties had, to save the expense of cabling a long message, agreed upon a cipher which meant this *and nothing more*, Cooper had no right to suppose that the message as delivered to the bank in

London could comprise anything more. Accordingly, if the message so sent is the entire contract then plaintiff's claim that by such message the money was to be actually delivered into the control of Martin, Turner & Co., at Glasgow, by mail, and in no other manner, has no other basis than the fact, that the natural course would have been "for our London office to send a check if the transferee is out of the city" (*p.* 17, *fol.* 42).

But a cable dispatch reading: "Pay Martin, Turner & Co., Glasgow, account W. B. Cooper, Jr.," does not necessarily imply that a payment to Martin, Turner & Co., otherwise than at Glasgow or by mail, is not a good payment. The word "Glasgow" is simply an address to identify the payees as being Martin, Turner & Co., of Glasgow, rather than of some other place, and as being the parties to be communicated with in reference to the transaction. The contract was to pay to Martin, Turner & Co., and if the payment was in fact made to them that satisfied the undertaking, unless there was an explicit undertaking to pay to them at Glasgow, and not elsewhere.

See *Cork Distilleries Co.* v. *Great Southern, &c., Co., L. R., 7 Eng. and Ir. Appeal Cases*, 269.

Second.—But Cooper attempted to show that when he purchased the cable transfer he gave such instructions, or conveyed such information, as imposed upon the bank the duty of seeing that the money was actually sent to the City of Glasgow. He testified: "I said I wanted to get *a rate* of cable transfer for five thousand pounds that I wished to send to my friends in Glasgow. He asked me whether I wished him to mail a check or to telegraph it through from London to Glasgow. I told him I wanted him to mail a check to Glasgow. He told me the rate

was 4.90½, which I thought was rather high * * * He had *two rates* of cabling for me. One was a rate when he mailed a check to my friends at Glasgow and another was when he telegraphed it up. When he telegraphed it up he charged me an extra rate because he said he had to pay a commission in Glasgow " (*p.* 14, *fol.* 37). The true import of this was that to send by mail would be *in time*, that there was no necessity for the expense of telegraphing the money from London to Glasgow. It is absurd to suppose that either party had in mind that it was important that the money should go *only* by mail, if in fact it reached the payees, and to go by mail so as not to get there a day too soon. There was no evidence to show any appropriation of the cable transfer to take up a maturing acceptance other than that, after stating the knowledge of Mr. McTavish as to the general character of the bills which plaintiff had drawn, plaintiff added, "And these very cables that I had bought, and was buying of him that day, was to take up one of those five thousand pound bills " (*pp.* 15, 16, or as quoted in the charge, *p.* 52).

But Cooper also testified that he did not identify the bill, except thus: A. I don't remember telling McTavish that the bill "matured exactly on the 29th, but I do certainly remember that I told him that the five thousand pound cable that I was sending to my friends at Glasgow was to take up a bill for a like amount due in a day or two" (*p.* 22, *fol.* 52). Nor did he pretend that his instructions looked to any duty on the part of the defendant, who had no information as to who held it, to see to the taking up of the bill. The money was to be paid to the acceptors, Martin, Turner & Co., to enable them to take up the bill.

An agent is not to be held responsible for disobedience to instructions which are left vague and obscure, if he acts in good faith upon a reasonable interpretation of them. Such were the alleged instructions involved in this transaction. They may be summarized as follows, giving to

the plaintiff the benefit of the most explicit form of stating them:

(1.) "I want to-day, February 26th, a cable transfer in favor of Martin, Turner & Co., Glasgow, for £5,000, to be sent in time to take up, or in order to enable them to take up a bill for that amount maturing in a day or two, or maturing on the 28th or 29th." This instruction was fulfilled. The money reached Martin, Turner & Co., and was in their entire control and disposition on the 27th.

(2.) "I want it to go in a check by mail to Glasgow, not by telegraph." This was not given explicitly as an instruction. That the money would naturally go in this way, in other words, that to telegraph the money from London to Glasgow would have been an additional expense, did not so incorporate the understanding as to render a delivery to the payee personally a breach of contract.

(3.) But the plaintiff claims, and to support his action must maintain, that this further implied instruction, though not expressly given, was really involved, "I don't want the money to reach Martin, Turner & Co. at Glasgow before the 28th; I don't want it to reach them except by a check which will ear-mark the remittance."

To spell out such an instruction from the transaction as it took place, to hold the defendants liable for violating it, and liable not simply for such special damages as might ordinarily result from the violation of it, but for the entire amount of the money remitted, would be to carry the responsibility of agents to an extent not justified by any case of authority.

"Where instructions are ambiguous and the agent acts *bona fide*, in accordance with a probable construction, he will not be held liable" (*Whart. on Ag.*, § 248; *Story on Ag.*, § 74).

And in *Ireland* v. *Livingston*, *L. R.*, 5 *H. Lords*, 395 (1872), Lord Chancellor Chelmsford said: "If a principal

gives an order to an agent in such uncertain terms as to be susceptible of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized because he meant the other to be read in the other sense of which it is equally capable * * * he should have given his order in clear and unambiguous terms" (*p.* 416). Again: It would be hard and unjust that the loss should fall upon "innocent agents who have followed what they honestly considered to be the directions of their principal, and it ought in justice to be borne by the principal, who has brought it upon himself by his want of precision and certainty in the language employed by him in communicating the order," (*p.* 417).

To the same effect is the language of STRONG, *J.*, in *Nat. Bk. of Comm.* v. *Merchants' Nat. Bk.*, 91 *U. S.*, 92. In case of doubt "the doubt ought to be resolved favorably to the agent. * * * If the absence of *specific* instructions left it uncertain what was to be done further, * * * it was the fault of the principal" (*p.* 104).

Whether the money reached Martin, Turner & Co. a day earlier or later could not have been thought of as making any possible difference, *if it was in time;* but the plaintiff attempted to establish the importance of its not reaching them *too early*, so as not to go into their general funds, and to reach them in a check sent by mail (*p.* 15) and not by a telegraphic order, so that the remittance being "earmarked" might be considered as specially appropriated; but this was an afterthought, or, at any rate, a private idea of his own, as he disclaimed any suspicion that Martin, Turner & Co. were about to fail (*pp.* 22–3, *fol.* 54), and of course communicated no such suspicion to the defendants.

What took place then on the purchase of the cable transfer included no such explicit instructions as rendered the defendant below liable.

In the Court below several cases of mis-delivery by carriers were cited to show the liability of the bank, and the learned Court considered that of *South. Exp. Co.* v.

Dickson, 94 *U. S.*, 549, as controlling, but assuming that the rules governing carriers as to the proper delivery of the identical property intrusted to them apply to the case at bar, the cases cited are inapplicable; they are generally cases of a delivery *to the wrong person*, in violation of duty or of special instructions, and of a loss resulting to the real owner. Thus in the case in 94 *U. S.* the goods belonged to one Dickson, were shipped by his agent to go forward to consignees named; were not sent on at all, but were redelivered to the agent from whom they had been received for carriage. But in the opinion of the Court in the same case several authorities were cited with approval where the delivery having been in fact made to the proper consignee, though not in exact conformity with the instructions, was held to absolve the carrier (*Sweet* v. *Barney*, 23 *N. Y.*, 335; *London, &c., Co.* v. *Bartlett*, 7 *Hurlst. & N.*, 400).

In the later case of *North Penn. R. R.* v. *Comm. Bank*, 123 *U. S.*, 727, the consignment was to the "order of P. M.," and the delivery was made without any order from P. M. This was held not to discharge the carrier.

Third.—In the Court below stress was laid on the fact that the agent of the bank knew that it was his own money that Cooper was paying for the cable transfer. If McTavish, "knowing that this was plaintiff's money," &c. (*p. 53, fol.* 115).

In the delivery of goods to a carrier this is frequently an element of importance upon the question whether the delivery vests the title in the consignee, or whether the consignor retains title; but this is generally controlled by the bill of lading.

In the case at bar, there was no question of retaining title to the identical money deposited. This was not to be transmitted *in specie*, but a relation of debtor and creditor was established. As soon as the money was paid to McTavish in New York, a debt was created from the bank,

not to the holder of the maturing bill, but to Martin, Turner & Co., which they could have enforced. What Cooper did was equivalent to depositing the money in the bank and delivering a check for it to McTavish, to be sent to Martin, Turner & Co., and as soon as such delivery was made for Martin, Turner & Co., Cooper lost all right to the money and all control over it, except, perhaps, the right of stoppage *in transitu* (*Muller* v. *Pondir*, 55 *N. Y.*, 325).

Of course, in delivering goods to a carrier, the consignor or shipper may retain control over them to save a lien or to prevent title passing, and so in paying money to a bank, or to any other intermediary for the benefit of another, the party paying may impress the money with a trust, but in the case at bar there was no trust. McTavish knew not only that the money paid to him for the cable transfer was Cooper's money, but he knew at the same time that it was paid by Cooper *for* Martin, Turner & Co. in fulfillment of his obligations to them. As Cooper, therefore, retained no hold over the money, and gave no instructions to withhold it in any contingency from the payees, the delivering of the money in accordance with his dealings with his correspondents and with his advices to them discharged him as between him and them, and at once vested the right to the money in Martin, Turner & Co.

The defendant below was therefore entitled to the instruction "that Martin, Turner & Co., acceptors of the bill falling due on the 29th of February, 1884, were primarily liable for its payment, and liable to the holder, whether put in funds by the drawer or not, and being so liable, the money remitted by the plaintiff became their money as soon as it came under their control, and then ceased to be his," and it was error in the Court to refuse the said instruction (*P.* 49, *fol.* 106).

Fourth.—There was no trust impressed upon the money.

Cooper had had the avails of the bill of exchange which he intended to take up, and although Martin, Turner & Co. were, as acceptors of the bill primarily bound, as between him and them it was his duty to put them in funds. "This transaction came under a general arrangement with the plaintiff (Cooper) by which he was to draw bills upon our firm and retire them at maturity by renewals until he provided for them by the sale of produce consigned to him by our foreign branches and against which the original bills were drawn" (*Martin, p.* 35, *fols.* 77–8). He might have made a special remittance, but he did not do so. He advised Martin, Turner & Co. only in general terms that he had "remitted since last advices £5,000 Bank of British North America" (*p.* 48, *fol.* 104). He testified: "I purchased this cable transfer in order *to put Martin, Turner & Co. in funds* to take up a bill of £5,000 which matured on the 29th day of February" (*p.* 21, *fol.* 50). The relations between him and them, accordingly, simply entitled him to be credited in account current with the £5,000 sent them.

This did not amount to such an appropriation of the money to pay the bill as impressed it with a trust for that purpose, no matter in what form it reached Martin, Turner & Co., if it reached them as a *general* remittance to go to his credit.

The notion that if the money had been sent by the bank from London in the bank's check that would have "ear-marked" it (*p.* 22, *fol.* 54), or impressed it with a trust, is preposterous. Cooper's own check on a bank in favor of Martin, Turner & Co., though drawn for the purpose of enabling them to meet the maturing acceptance, would not, until notified to the drawee, have created a lien or charge upon his account with his bank (*Chapman* v. *White*, 2 *Seld.*, 412; *Laclede Bank* v. *Schuler*, 120 *U. S.*, 511).

There must, to create such a lien, be something more than a general purpose; there must be a specific appropriation of the particular fund to the particular object (*Trist* v. *Child*, 21 *Wall.*, 441; *Rodick* v. *Gandell*, 1 *De G., M. &*

G., 763; and see *St. Louis, &c., Railway Co.* v. *Johnston*, 133 *U. S.*, 566; *Phelps et al.* v. *Comber*, *L. R.*, 29 *Ch. Div.*, 813; *Brown et al.* v. *Kough*, *id.*, 848).

In the case at bar, the transaction made Martin, Turner & Co. creditors of the Bank of British North America until the money was paid, but did not impress upon the money due to Martin, Turner & Co., either before or after it was paid to them, any lien or charge in favor of the holders of the bill about to mature (*The People* v. *Merch. & Mech. Bank*, 78 *N. Y.*, 269).

It would appear that Cooper, while abroad, had unsuccessfully attempted to have his remittance appropriated to the payment of his bill. This was probably due to his not having specially appropriated the remittance. He sent it simply for credit to his account, whereas if he had sent it specially to pay the maturing bill, as was done in *Ex parte Kelley & Co.*, *L. R.*, 11 *Ch. Div.*, 306, it could have been treated as "ear-marked."

Fifth.—The point was made below that in paying the money into the London branch of the Bank of Scotland, the Bank of British North America did not pay it in "to the account of Cooper" (*P.* 37, *fol.* 81). The answer to this suggestion is that the Bank had no right under its instructions to pay to any one else, except to Martin, Turner & Co., and to have paid it as a special deposit to the credit of Cooper or for account of Cooper in the London branch of the Bank of Scotland would have been a clear violation of the instructions, and left the money at the risk of the defendant below, and unavailable to Martin, Turner & Co. Cooper might, when he arranged to send the money, have made a special appropriation of it, but cannot complain that this was not done by some one else who had no right to do it.

Sixth.—The money was not *lost*, nor was it paid to the wrong person. The money was for Martin, Turner & Co.: it was Cooper's duty to send it to them, it was received by them, and the mode in which it was paid was expressly ratified by them. They were liable as acceptors of Cooper's bill, not simply if they received funds to meet it, but generally to the extent of their estate, and they had a right accordingly to use this remittance as a part of their general assets, unless it was specially appropriated by the plaintiff. He made no such appropriation by his cable to them, and no other communication from him to them is pretended. (*P.* 35, *fols.* 77–8). The result is, simply, that the plaintiff, as agent for Martin, Turner & Co., is entitled to credit in account with them as his principals for this remittance, and, if a loser, is a loser only by reason of their bankruptcy.

As soon as plaintiff paid in the £5,000 to the defendants' agent at New York (that mode of remittance being in accordance with instructions) and telegraphed to Martin, Turner & Co. of the remittance without in his telegram imposing any restriction upon their use of the money, the title to which vested in them, it was at their risk, and they could use it generally in their business.

The loss to the plaintiff, so far as he sustained any, was caused in legal effect by the bankruptcy of Martin, Turner & Co., and by his own neglect to appropriate his remittance specifically.

(1.) For the bankruptcy of Martin, Turner & Co. the defendants are in no way culpable. No act or default of theirs contributed to it.

(2.) Plaintiff did nothing towards appropriating his remittance to the payment of the bill maturing on the 29th beyond his making the arrangements he claims to have made with the defendants, and his cabling to Martin, Turner & Co. the following: "To Glasgow, 26th February, 1884: Have remitted since last advices five thousand pounds, Bank of British North America. Will remit four

thousand 28th of February. Sugar market dull" (*p.* 48, *fol.* 104).

If this was an appropriation of the remittance to the payment of the bill, then no loss in fact occurred even to him, though there would probably be some inconvenience in getting the appropriation acquiesced in by other creditors.

(3.) But nothing that these defendants could do in England, after the receipt of the cable message in London, would have had the slightest effect upon the question whether the remittance, which came within the jurisdiction of Great Britain on the 27th day of February, was or was not so specifically appropriated as to keep it from other creditors of Martin, Turner & Co.

The money was due *at once*, from the defendants to Martin, Turner & Co., in London, on the 27th February.

Suppose Martin, Turner & Co. had been in defendants' office in London on the arrival of a cable message from the agency in New York, and had said: "Pay us here the £5,000," the bank could not have excused a refusal to pay by saying: "We are instructed to pay it to you in Glasgow, not in London,": "We are instructed to mail a check so that it will be identifiable as Cooper's remittance;" or "We are instructed to pay you by mail, so that you won't get it till to-morrow." It is clear that none of these answers to a demand for the money would have any effect whatever on the question whether the amount would go to Martin, Turner & Co. charged with an appropriation for the payment of the maturing bill or as funds unappropriated. The money was, in fact, paid in to the Bank of Scotland, in London, where the maturing bill was payable, by direction of Martin, Turner & Co., and to their credit, and then became a debt from that bank to them. It is impossible to see how, under the Bankrupt law, it made any difference whether the £5,000 was in the form of a debt still unpaid from the defendants, in the form of a check on another bank enclosed in a letter, or in the form of an indebtedness from the Bank of Scotland.

(4.) If it be said that the Bankrupt law of England is not in evidence, the answer is that its effect is assumed by the plaintiff in order to show the loss which he suffered. His case is: "True you paid the money to Martin, Turner & Co., as you were instructed to; but you paid it on the 27th, not 28th, by a deposit to their credit, not by a check." But then to the question: "What possible difference did that make?" the reply is: "Why, they stopped payment on the 28th, and if you had not paid till the 28th the money would have been set apart for the bill which matured on the 29th."

To support this notion, Campbell, of Martin, Turner & Co., was asked: "Would the said $5,000, if received by your firm on the morning of February 28th, have been given to your assignee or trustee in bankruptcy? *Ans.* Probably it would have been, but, in any case, Mr. Cooper's interest would have been guarded. We should have *endeavored* to have had it used for the specific purpose for which it was intended" (*p.* 46, *fol.* 101).

Martin, of the same firm, in reply to the same question, answered: "It would have been given to the trustee for the purpose mentioned, unless directly applied by the firm for the purpose" (*p.* 34, *fol.* 75).

This is, of course, pure speculation. What Martin, Turner & Co., who had suspended on the 28th, could have done with this money on the 29th, would depend on the Bankruptcy law, but it is absurd to say that their right or power under that law, or any other, to appropriate it to the payment of Cooper's bill depended on the question whether they got it on the 27th or the 28th, or in the form of cash, check or otherwise. They knew that the £5,000 was sent by Cooper in view of the maturing of that bill, that it was sent by a cable transfer from the defendants' New York agency, and that the check by which the defendants paid it over was deposited in the Bank of Scotland to their credit. There was no obstacle by reason of the manner in which the bank had so paid over the money to Martin, Turner & Co.'s "ear-making" the remittance or treating the money as impressed with a trust

which would take it out of their general funds if it had been so impressed, but *it needed their act to do it.* No one else could do it, as it had become their money, and could be used by no one else. If they let it go into their general estate, the defendants here are not liable. And whether it belonged to their general estate, or was to be considered a specially appropriated fund, did not at all depend on the fact whether the money was represented by a check of the Bank of British North America on Glynn, Mills & Co. (*p.* 36, *fols.* 79, 80) sent to them instead of the Bank of Scotland to their credit. In the one case it would have been the indebtedness of Glynn, Mills & Co. the drawees of the check; in the other, as in fact it was, the indebtedness of the Bank of Scotland. Martin, Turner & Co. could have drawn the £5,000 out of that bank at any time before their stoppage of payment.

(5.) But it may be said that owing to its being paid into the Bank of Scotland the £5,000 became subject to the lien of that bank. This presents the same question in another form. The bankers' lien does not attach to funds impressed with a trust unless the bankers have made advances upon the faith of such funds in ignorance of the trust (*Reynes* v. *Dumont*, 130 *U. S.*, 354).

The account of Martin, Turner & Co. with the London branch of the Bank of Scotland was put in evidence by plaintiff below, and from it and the testimony (*p.* 36, *fol.* 80 *p.* 37, *fol.* 82); it appears that after this £5,000 was deposited on the 27th February there stood to the credit of Martin, Turner & Co. £8,039 7s. 4d., until after their suspension. No reason is shown why Martin, Turner & Co. could not have drawn out £5,000 by check immediately they were notified of the deposit. This sum of £8,039 7s. 4d. was afterwards transmitted to the Glasgow branch on the 7th of March. The accounts of Martin, Turner & Co. with that branch do not appear, but one of the partners testified: "As my firm was indebted to the Bank of Scotland to a considerable extent I suppose they retained this sum to lessen their loss" (*p.* 47, *fol.* 102).

The other: "It was retained by the Bank of Scotland, which was a creditor of our estate" (*p.* 34, *fol.* 75). But they also say that they made no new transactions after the 27th (*p.* 33, *fol.* 74), so that the bank retained the deposit as creditor on account of prior transactions. The Bank of Scotland retained the money, but without right if it was impressed with a trust, unless they parted with value after its receipt, which the plaintiff does not show.

The law in respect to the right of bankers to retain moneys in their hands as against a claim that they are impressed with a trust, is the same in England and in the United States (*Reynes* v. *Dumont*, 130 U. S., 354). The rule is recognized in all these cases that money impressed with a trust can be followed as long as it can be traced, though mingled with other funds, and that, as against a bank where it has been deposited, the trust will be enforced unless the bank has made advances upon the credit of the deposits without notice of their trust character.

(6.) There was no reason whatever, then, why Martin, Turner & Co. could not, by mere notice to the Bank of Scotland, given as soon as advised of the deposit, have appropriated the £5,000 to the purpose for which it was intended, and charged it with the trust which it is claimed it would have been subject to if represented by a check received by mail and lying in their office; or have drawn a check on that bank to reclaim the same money. The true difficulty was, whether in respect to the Bankrupt law or the claim of the Bank of Scotland to a lien, that Cooper had not made a specific appropriation of his remittance to pay the maturing bill. Neither his telegram to them nor his purpose in sending the money was an appropriation (*People* v. *Merch. & M. Bank*, 78 *N. Y.*, 269).

If they ought to have done this, as perhaps in equity they ought, there is no evidence that they could not have done this on the 27th, when advised by defendant's telegram of the deposit to their credit. If they could not do it by reason of their difficulties, or the lack of any suffi-

ciently definite appropriation of the remittance, or the law which tied their hands, the defendant bank is not responsible.

Seventh.—The Court below erred in refusing to strike out the oral evidence given to enlarge the scope of the instructions (*p.* 45, *fols.* 98–9) and in submitting it to the jury (*p.* 49, *fol.* 106).

There are cases in which such oral testimony is competent to show what consequences of a breach of contract may have been contemplated by the parties, and so to affect the measure of damages (*Baldwin* v. *The U. S. Tel. Co.*, 45 *N. Y.*, 744, 750); but in the case at bar, McTavish could perform the contract or communicate information about it only by cable, and the form and purport of this communication had been arranged between him and Cooper. This certainly excluded everything else from the contract. (*Martin* v. *Cole*, 104 *U. S.*, 30.) If Cooper wanted further instructions cabled than those meant by the cipher, he should have said so explicitly and paid the cost of them.

Eighth.—The cases cited to sustain the action, fail to do it. They are mostly cases where property intrusted to a carrier was lost, lost both to the consignor and the consignee; to the remitter and the remittee; lost to the party entitled to the property or money, by reason of the deviation from instructions. In *South. Express Co.* v. *Dickson*, 94 *U. S.*, 549, the carrier wrongfully re-delivered the property to the person from whom he received it, knowing he was not the owner, and was held liable; as if, after accepting the duty to deliver to Martin, Turner & Co. the defendant had given back the £5,000 to the plaintiff; for

so doing, it would have been liable to Martin, Turner & Co. In other words, as soon as the consignment had been made it belonged to Martin, Turner & Co.

In *Johnson* v. *The New York Central R. R. Co.*, 33 *N. Y.*, 610, the defendants were held liable for forwarding goods by a line other than the one named by the shipper, and the goods were *lost* by a peril of navigation.

So in *Goodrich* v. *Thompson*, 44 *N. Y.*, 324, a company undertook to forward goods by the *Ocean Bird*, but sent them by the *Crescent City* which was lost.

Cases of this kind might be multiplied. A substantial difference between them and the case at bar is that owing to the disobedience of instructions, the property never reached the party entitled to receive it, and was lost to both parties.

But suppose that, in the case last cited, both vessels arrived, but the one by which the goods were sent arrived a day earlier than the other, could the carrier be charged, as with a loss of the goods, if the consignee for whom they were intended, received them in time and in good order?

Hays v. *Stone*, 7 *Hill*, 128; S. C., 3 *Den.*, 575, was the case of an agent, debtor to his principal for money to be remitted. He undertook to remit it, not by a cash bill of exchange, bought with the money, but by a time bill bought on his individual credit, and this bill turned out bad. It was held that by such a remittance, sanctioned in no way by the principal, the agent had not discharged his debt. It is difficult to see what bearing this case has upon the case at bar, beyond the general rule alluded to in it, that an agent must follow the instructions of his principal, a rule not disputed here.

Sweet v. *Barney*, 23 *N. Y.*, 335, has already been referred to, and sustains the defence.

But instructions vary, and so the rule of obedience is to be applied reasonably to every particular case.

In the case at bar, then, plaintiff in error contends:

(1.) That the instructions were complied with in their

general tenor; the money was paid to Martin, Turner & Co. on account of Cooper, and was received by them.

The particular features of the instructions now relied upon as having been violated, were not explicitly given, nor given at all, so as to advise the bank of their materiality. They are now by afterthought spelled out from what did take place, and that obscurely and by oral evidence which could not by the mode adopted for remitting the money be communicated to the Bank.

(2.) There was no loss, in fact; the money reached safely the parties who were entitled to receive it, and for whom it was intended.

(3.) There was, in legal contemplation, no loss to the plaintiff below. His telegram to Martin, Turner & Co., coupled with the purchase of the cable transfer, effected simply a remittance on general account.

(4.) What is called a loss, was the result of Martin, Turner & Co.'s pecuniary difficulties, not contributed to by any act or omission of the Bank.

Ninth.—If the rights of the parties are as claimed by the plaintiff in error, a verdict should on the trial have been directed for the defendant below (*Pleasants* v. *Fant*, 22 *U. S.*, 116, 120; *Anderson Co.* v. *Beal*, 113 *U. S.*, 227, 241; *North Penn. R. Co.* v. *Comm. Bank*, 123 *U. S.*, 727), and the erroneous rulings of the Court should lead to a reversal of the judgment.

STEPHEN P. NASH,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1890.

No. 103.

THE BANK OF BRITISH NORTH AMERICA,
Plaintiff in Error,

vs.

WILLIAM B. COOPER, Jr.,
Defendant in Error.

In error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR DEFENDANT IN ERROR.

JOHN M. BOWERS,
Counsel for Defendant in Error.

NEW YORK:
DOUGLAS TAYLOR, LAW, BOOK AND JOB PRINTER, 89 NASSAU ST., COR. FULTON.
1890.

Supreme Court of the United States,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE BANK OF BRITISH NORTH AMERICA,
Plaintiff in Error,

vs.

WILLIAM B. COOPER, JR.,
Defendant in Error.

No. 103.
Brief for Defendant in Error.

Statement.

The defendant in error, being desirous of remitting the sum of £5,000 sterling, to be paid to the firm of Martin, Turner & Co., at the City of Glasgow, in Scotland, to be used by them in paying a draft or bill of exchange for said amount which had been drawn by him on said firm, and which he had promised and agreed to provide funds to meet at its maturity, and which did mature on the 29th of February, 1884, applied to the plaintiff in error at its office at the City of New York, and employed it to remit said sum by telegraph to itself at its office, at the City of London, to be paid by said defendant from said office at the City of

London by a draft to be sent by mail to the said firm of Martin, Turner & Co., at Glasgow, and with notification that the same was remitted for account of the plaintiff. The plaintiff in error accepted the employment and agency thus created and cabled to its London house by a proper message the instructions so given. The London house, however, instead of sending the draft for such amount to Martin, Turner & Co., at Glasgow, on the 27th of February, 1884, paid such £5,000 to the Bank of Scotland at London to the credit of Martin, Turner & Co., of Glasgow. The contract with the Bank of British North America for the transfer of this sum of money was entered into on the 26th day of February, 1884. On the 28th or 29th day of February, 1884, Martin, Turner & Co. failed and suspended business. The evidence establishes that if the money had been sent by draft by mail to Martin, Turner & Co., at Glasgow, it would have been applied for the purpose for which it was sent. As it was, the Bank of Scotland appropriated the money on account of an indebtedness of the firm of Martin, Turner & Co. to it, and by reason of the £5,000 having been paid to them in the manner above stated the object of the remittance failed, and the £5,000 was not used to take up the draft for which purpose it had been remitted, and Cooper was thereafter compelled to take up and pay or provide for his draft which this remittance had been made to meet.

The verdict of the jury, upon sufficient evidence, establishes the fact that on the 26th of February, 1884, the defendant in error called at the office of the plaintiff in error in this city and employed it to cable £5,000 to its agency at London and mail a check for the same to Martin, Turner & Co. at Glasgow (see fol. 37). For some years prior to such transaction the plaintiff in error had had many business transactions with the defendant in error, consisting, among other matters, of making remittances by cable to the firm of Martin, Turner & Co. This business had been so carried on

during the years of 1882, 1883 and 1884. Three methods had been arranged for the remittance of his moneys: one a cipher directing the transfer by cable to London, and the mailing of a draft or check for the same to Martin, Turner & Co., at Glasgow; another, a cipher directing the cabling of the money to London and the payment of the same at the office of Martin, Turner & Co. in that city; and still a third, directing a transfer by cable to London, and then the transmission of the amount so transferred to Martin, Turner & Co., at Glasgow, by telegraph (see fols. 86, 87, 92). The rates differed as between the mailing of the check from London to Glasgow and when the same was telegraphed up (fol. 37). The defendant in error was cognizant of the time that it would take for a draft to be transferred by mail from London to Glasgow, to wit, one day (fol. 38). The plaintiff in error was informed of the object of the remittance in question and was advised that the money remitted belonged to the defendant in error, and was being remitted to take up a draft that he had drawn upon the firm of Martin, Turner & Co.

It seems that among other business done between the parties to this action the defendant in error had on many occasions sold to the plaintiff in error at its agency in New York bills that he drew on Martin, Turner & Co. under letters from them authorizing him to make such drafts; and that he had informed the plaintiff in error that he always took such bills up at maturity, and that the remittance he was making on the date in question, to wit, the 26th of February, 1884, was to take up one of the bills he had theretofore drawn on Martin, Turner & Co. See folios 39 and 40, where this language is used:

"I called his attention to the fact that I had made these cable remittances to take up those very drafts, and, among other remittances, that this very remittance was being made for such purpose."

About the time the agency in question was created, a

receipt was issued by the plaintiff in error to Mr. Cooper in the following form:

NEW YORK, 26th Feb., 1884.

W. B Cooper, Jr., Dr. to the agents, Bank of British North America, 52 Wall Street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Co., Glasgow, £5,000, at 4.90½	$24,525
Cost of cable	2
	$24,527

This transfer is sold without responsibility to the Bank of British North America or their correspondents for error or delay in transmission." (Fol. 46.)

The receipt was not given at the time the contract was made, but later (fol. 49). The statement that the money was being remitted for the purpose of taking up a bill of exchange which the defendant in error had drawn upon Martin, Turner & Co. is reiterated at folio 50. The explanation as to the difference in the charge where the money was telegraphed up from London to Glasgow, appears at folio 52; and defendant in error stated that the bill that this money was sent to take up matured on the 28th or 29th. The bill that this money was remitted to take up was payable in London at the Bank of Scotland (fol. 53), but the evidence shows that all the information the defendant in error had upon the subject at that time was that he had drawn the bill payable in London (fol. 53). Martin, Turner & Co. had a house in London, 29 Mincing Lane, as well as their Glasgow house, and McTavish, the agent of the plaintiff in error, distinctly asked Mr. Cooper whether he wanted the £5,000 sent up by mail or telegraph to Glasgow, and Cooper told him that he wanted it mailed (fol. 53), and in every case where he had purchased transfers prior to this transaction on the 26th of February, he made a

special request that the money for which the cable transfer was given should be remitted either by mail or cable (meaning telegraph), and that question always arose (fol. 54).

No order was signed at the time of the transfer in suit, but a memorandum was made by the defendant itself similar to orders that had been signed in other cases, showing that the transfer was to be made to Martin, Turner & Co. addressed to Glasgow (evidence of McTavish, one of defendant's agents, fol. 64). The memorandum thus made by the defendant below at its office was in the words following:

"ORDER FOR CABLE TRANSFER.

NEW YORK, 26 Feb., 1884.

To the agents of the Bank of British North America,
52 Wall Street:

Transfer by cable to *Martin, Turner & Co.*
Address, *Glasgow.*
On ℅ of *W. B. Cooper, Jr.*
Amount, £*5,000.*
Par, *24,250.*
Premium, *275.* Rate, *490½.*
Discount,..... Cost of Message, $*2.*
Net amount, *24,525.* Purchaser, ...

The Bank of British North America is not responsible for any delays, interruptions or errors of the telegraph companies or operators."

The above was one of the blanks of the defendant, the case showing at folio 65 what words were printed and what words were written in by the defendant. Opposite the words "Transfer by cable to," which was in print, was written in by the plaintiff in error "Martin, Turner & Co." Opposite the word "address," was written in by the plaintiff in error, "Glasgow." Opposite the words "on account of," was written in by the plaintiff in error, "W. B. Cooper, Jr."

The evidence of Mr. Cooper that the plaintiff in error was fully informed as to the object of this remittance is substantiated by the evidence of Charles P. Walker, who says, at folio 66: "It was spoken of several times that they," that is, these remittances, "were to take up bills that had been drawn previously by Mr. Cooper on Martin, Turner & Company, Glasgow," (fol 67). That McTavish had informed him that their code covered at least two and he understood three different ways, the understanding being that remittances were made to Martin, Turner & Co., Glasgow, for account of William B. Cooper, Jr., New York, and that of two ways of sending them, one was to cover by mail from London, and the other by telegraph from London to Glasgow (fol. 67. See his cross-examination on these points, fols. 68, 69, 71.) And in each instance (fol. 72), when he went to the bank to arrange for cable transfer, the question as to whether it should be sent up from London by mail or telegraph was always mentioned; and that they arranged to send by mail so as to get it there in time, a day ahead of the bill. If telegraphed up it would reach Glasgow quicker than if sent by mail, and that was sometimes desirable.

The evidence of Mr. John M. Martin, one of the members of the firm of Martin, Turner & Co., is to the effect that had this draft been mailed, it would have reached them on the 28th of February, at which date they received advices which led them to determine that they must suspend business. There is a discrepancy as to whether the doors were closed on the 28th or 29th of February, but whichever date it was is immaterial, we submit, for the purposes of the discussion of the questions involved in this case; because Martin testified that after reading their letters on the 28th of February nothing of importance was done; that the amount was remitted for the purpose of taking up the bill of Cooper's which was falling due on the 29th, and which he had promised to protect (fol. 75), and

"If the £5,000 remitted by Cooper had been received by

our firm on the morning of the 28th of February, 1884, it would have been applied to retire the said bill falling due on the 29th, or retained intact to be handed over to the trustee of the estate, to be applied to the purpose intended."

"No money was received by our firm on the morning of the 28th, but on the 29th we received from A. R. McMaster & Brothers, on account of Mr. Cooper, a draft for four thousand pounds to retire a bill of Mr. Cooper's for the same amount falling due the 3d of March, which was applied for that purpose."

"The £5,000 was paid into the Bank of Scotland, in London, to the credit of our firm by the defendant's London branch on the 27th February, 1884, and it was retained by the Bank of Scotland, which was a creditor of our estate" (fol. 75).

The plaintiff in error admits (fol 79), that it knew generally that these remittances were to take up drafts which were maturing.

The evidence of Thomas Hinton Campbell, another member of the firm, is that if the £5,000 had been received by his firm on the morning of the 28th of February, it would have been used to protect Mr. Cooper's interest, by being applied in payment of the draft drawn on him by Cooper maturing February 29th, 1884; that he recalled to mind that a remittance was received by his firm on the 28th of February, 1884, for a specific purpose, and was so applied (fol. 101).

The defence was a denial of the allegations as to any specific statement being made by Mr. Cooper concerning this remittance; and the allegation that Cooper merely came in and asked for a remittance as usual to his correspondents, Martin, Turner & Co. It was denied that anything was said as to the purpose for which the transfer was to be made, or that any allusion was made to transmitting it to take up any bill drawn by him which was maturing at that time; and that nothing was said in reference to his desire that the money should go by mail from London to Glasgow. Generally a denial was made of the specific

allegations as to information being given the defendant of the ownership of the money, its use and object, and that it was specially desired that it be sent by mail from London to Glasgow (fol. 85). The defendant, however, admitted (fol. 87) that there were two cipher words used in transmitting moneys from Mr. Cooper; that the first was registered on the 2d of September, 1882, and read "Martin, Turner & Company, Glasgow, on account W. B. Cooper, Jr.", which was the one used on the 26th of February; and the second was registered the 27th of November, 1883, and read "Martin, Turner & Company, Market Buildings, 29 Mincing Lane, on account W. B. Cooper, Jr." (fol. 87).

It was also admitted that Cooper knew the interpretation of the code words used for these purposes, and that the Bank of British North America had been in the habit of frequently purchasing bills of exchange drawn by Cooper on Martin, Turner & Co.; and that he had frequently during that time made cable transfers through them to Martin, Turner & Co.; that they knew that Cooper had selected as the address of Martin, Turner & Co. for this cable transfer the word "Glasgow" (fol. 91); and that "He gave us the money for them, and that, I presume, conveyed to me knowledge that in some form or other it was his money being sent to them, either to pay money or for some other purpose." Also, "it appears from the cable transfer that I knew that for some cause or other he chose in some cases to make his remittances to that firm at Glasgow, and in some cases to that firm in London. Upon one occasion we telegraphed the money up instead of sending by mail, I believe." And the witness adds that he knew in that way, if it would not go there a day quicker than if it went in the ordinary course of mail, it would get there some hours quicker, at all events. And he adds, "I believe we had a word for that also. We didn't change the cipher word. We put another word in. When we sent a telegraph that way it represented Martin, Turner & Company, Glasgow, and when we sent another cipher it represented Martin,

Turner & Company, London. In telegraphing to Glasgow we used the first one of these ciphers, merely adding a word, and that was pretty good notice to me that the money was to be paid to them in Glasgow" (fol. 92); and at folio 95, that it was usual to charge a higher rate for a transfer where the transfer was made by telegraph from London to Glasgow than where it was not so made; that the only office of the defendant in Great Britain is in London, and that Cooper knew that if the parties to whom the money was to be paid were not near London it must be sent either by mail or telegraph (fol. 96). Concerning conversations with Cooper as to telegraphing the money up or sending it by mail from London to Glasgow, Mr. McTavish testifies, folio 98:

"I think the conversation was that in the event of its going by check to Glasgow we gave it to him at our lowest cable transfer rate; if it went by wire, then we should charge him one-sixteenth extra. That is all that took place. If it went by wire, which would get the money to Martin, Turner & Co. a little earlier, then he would have to pay a little extra rate, and that was all that took place on the subject as far as I recollect."

At folio 99 occurs the following:

"Then it was a fact that, at the commencement, Mr. Cooper was informed that the money would be transferred by mail to Martin, Turner & Co., Glasgow, from London?

"A. I have no doubt it was so, and if he wanted it sent by telegraph he would have to pay a higher rate, which he did in one instance."

The excuse of the plaintiff in error for paying the money to the Bank of Scotland to the credit of Martin, Turner & Co. was that on the 3d of July, 1883, a letter was written it at London by Martin, Turner & Co. in these words:

"DEAR SIRS:

"We are favored with yours of yesterday and note the contents.

"The amount, £2,000, has been paid to us to-day by National Bank here; conformably with your advice, for which we are much obliged.

"In the future please pay all transfers of monies from Mr. Cooper, New York, to the cr. of our account with the Bank of Scotland, Lothbury, London, kindly advising us of same by telegram when paid, and kindly do so until advised to the contrary.

"We are, dear sirs, your ob't servants,

"MARTIN, TURNER & Co."

This letter appears at folio 103, and evidence was given that it was never revoked. It was not, however, pretended that Mr. Cooper had any notice of these instructions, nor was it claimed that the defendant's agency at New York knew anything about such instructions. While Mr. McTavish, at folio 96, indicates by an answer that from the time that order was sent to the home office in London it was obeyed, it appears at the same folio that the letter was not sent to them in New York until after the failure; and at folio 99 he testified:

"I don't think we knew—I don't know for certain that we knew—until after the plaintiff's letter of April 24th, giving the details of this claim that the house on the other side had any such instructions as they now claim to have from Martin, Turner & Co. If we had known it, I don't know that we should have told Mr. Cooper that we were paying all this money in London."

And so in their correspondence with Mr. Cooper when he presented this claim they make no reference to any such letter. At folio 42 appears a letter, under date of the 24th of March, in which the agent here at New York says to Mr. Cooper, in answer to a request as to what disposition had been made of the cable transfer of £5,000 in suit by the Board of Directors of defendant, that the transfer referred to was sent to Martin, Turner & Co., Glasgow,

£5,000 account W. B. Cooper & Co., and that the usual course was for their London office to send a check if the transferree was out of the city.

The next letter is dated the 25th of April, which acknowledges the receipt of the letter from Mr. Cooper, and says that, after communicating with their London office, they will write further.

That Mr. Cooper could not have known of the existence of any instructions by Martin, Turner & Co. is established by various propositions. In the first place, he avers in his complaint, fol. 10, that the money was paid without knowledge on his part on the 27th day of February to the Bank of Scotland at London.

His Honor, Judge Coxe, in the opinion rendered on the motion for a new trial, said upon this point:

"Instead of doing this"—that is, complying with the instructions Mr. Cooper had given—"the defendants, without the knowledge of the plaintiff, and contrary to his instructions, paid the money to the credit of Martin, Turner & Co. at the Bank of Scotland in London" (fol. 31).

The letter above referred to on the 24th of March is conclusive that the agency of the plaintiff in error in New York could have had no knowledge of any such instructions at that time. Also in a letter written as late as the 9th of June, McTavish says to Cooper:

"Replying to your letter of 7th inst., our cipher words with our London office, to which you refer, represent the following phrases:

"'Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr.,' and 'Martin, Turner & Co., 3 Market Buildings, 29 Mincing Lane, ac. W. B. Cooper, Jr.'

"The word to mean the first of these phrases was used in cabling the £5,000 as per your requisition."

And McTavish says, at folio 96, where he makes reference to this order, when asked, "Had you any knowledge about it?" "Oh, yes; our London office sent us out a copy of their letter." But he admits that they did not do so until

after the failure of Martin, Turner & Co.; and at folio 99 he is express that he does not think they knew, that he does not know for certain that they knew, until after Mr. Cooper's letter of April 24th, 1884, of any such instructions, and if they had he does not know whether he would have told it to Mr. Cooper. But the transaction which completely determines this question is the evidence of Mr. McTavish, page 27, folio 62, that he recollects there were purchases that Cooper made where he directed the money to be telegraphed from London to Glasgow; that on the 6th of September, 1883, he did this. "That money was directed to be sent by telegraph from London to Glasgow, and we so instructed by our cipher."

Certainly, if the defendants at New York then knew that the home office in London, in pursuance of these alleged instructions from the parties to whom remittances were being made, were paying such sums to the Bank of Scotland at London, and not remitting them to Martin, Turner & Co. at Glasgow, they were engaged in the practice of a petty fraud, in accepting compensation for telegraphing the money up to Glasgow and a gross violation of their duty to their principal in not informing him as to their conduct concerning the large sums he was remitting through them. In addition to all this, it will be noticed that in paying the money to the Bank of Scotland, the defendant did not even take the trouble to say that it was for the account of W. B. Cooper, Jr.; for the letter which they have offered in evidence, by which they transferred that money to the Bank of Scotland, is in these words:

"LONDON, E. C., 27 Feb., 1884.

"*Bank of Scotland, Lothbury, E. C.*

"GENT'N: In accordance with instructions received this morning from our New York ag'ts by telegram, I beg to inclose this bank's cheque for £5,000 (five thousand pounds) for credit of Martin, Turner & Co., Glasgow, receipt of which please own."

That is signed by the secretary of the plaintiff in New York. He makes no reference whatever to Mr. Cooper, or that the remittance is for his account.

No objections were made to the reception of evidence in the case by either side; and the jury found the version of the transaction given by the defendant in error in his favor. The facts, therefore, that are established for the consideration of this Court amount to this: That on the 26th of February, 1884, the plaintiff in error knowing that the money handed it by the defendant in error belonged to him, and that he was sending it to retire a draft, agreed with him to forward it by cable to London and by mail in the form of a check from London to Martin, Turner & Co. at Glasgow, and instead of doing this the plaintiff in error, without the knowledge of the plaintiff, and contrary to his instructions, paid the money to the credit of Martin, Turner & Co. at the Bank of Scotland in London; and the damage was that if the money had been sent by check, by mail, to Martin, Turner & Co. at Glasgow, it would have been applied to take up the draft, in payment of which it was remitted; and by reason of the fact that it was not so remitted, it was not applied for such purpose, and Mr. Cooper was compelled to provide otherwise for the payment of his draft, and lost his £5,000 (fol. 57, p. 24).

FIRST POINT.

Where the principal is known by the agent to be interested in the money to be transmitted, or the agent is informed as to the purpose for which it is transmitted, he must be understood as contracting with his principal only, for his interest, upon such terms as he dictates in regard to the delivery, and the person to whom the money is transferred is to be regarded simply as an agent selected by the owner to receive the same at the place indicated.

Southern Express Co. *vs.* Dickson, 94 U. S. 549.

In that case the Express Company received at Greensboro, N. C., fifty-two cases of tobacco, to be shipped to Columbia, S. C., consigned to Trent & Rea of that place. The Express Company was informed that the goods belonged to the plaintiff in the action, and although the person who actually made the delivery to the Express Company was one Trent, a member of the firm of Trent &, Rea, the consignees, the company were held responsible for the value of the goods because of their having surrendered the same up at Greensboro to a person who came with authority to receive the same at that place, signed by Trent. The charge was that if the jury believed from the evidence that the tobacco was, at the time of the delivery to the defendant, the property of the plaintiff, and that fact was known to the defendant or its agent, though by the receipt given for it Trent & Rea were consignees thereof, and the defendant might lawfully deliver the tobacco to the consignees at Columbia, S. C., the defendant was not authorized to deliver the same to the consignees or either of them

or to any other person by order of either of them, at Greensboro, the place of shipment, and such delivery at Greensboro without the knowledge and consent of the plaintiff would not discharge the defendant from liability therefor to the plaintiff.

The verdict that followed the charge was sustained by the Court; and the Court said that the issue was this:

"The Express Company is not liable if upon the order of Trent it was justified in delivering the property at the place of its intended shipment. If it was not so justified, but was bound to transport and deliver as agreed in its receipt, or to deliver to the owner, then it is liable."

And the law which we submit covers the present case is thus stated in the opinion in that case:

"The question is, rather: where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, can the carrier deliver the goods to to such consignees or to their order at another place, or without starting them on their journey? We think the rule is, that, where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated."

The case of Sweet *vs.* Barney, in 23 N. Y. 335, which is referred to in the opinion in the case just cited, is authority for the same proposition. In that case common carriers of money from a banker in the interior to a bank in New York, having no notice of the ownership, were held to have been authorized to treat the consignee as entitled to control the matter of its delivery, and were protected by any delivery which discharged the carrier as between him and the consignee.

The doctrine, therefore, established by these cases is that, if the agent knows that his principal is the owner, he must strictly obey the instructions given to him.

Story on Agency, Section 192,

Isaacson *vs.* New York Central & Hudson River Railroad Company, 94 New York, 278,

where baggage was agreed to be carried by one route, but was taken by another.

Loeb *vs.* Hellman, 83 New York, 601,

where the agent agreed to purchase bills of exchange secured by valid bills of lading, and in ignorance of the fact, purchased bills secured only by forged bills of lading.

In the Court below (see 45 Superior, 336) the Court said:

"The case was one of a special agency under which the duty of seeing that the Bills of Exchange were fully covered by actual shipments of cotton, and that the Bills of Lading were valid, were imposed upon the defendants."

Maghee *vs.* Camden & Amboy R.R. Co., 45 N. Y. 514, where carrier having engaged to transport by land carried the goods a short distance by water.

The Court says, p. 522:

"Where forwarding agents send goods in a mode prohibited by the owner they do it at their own risk, and incur the liability of an insurer."

Wilson *vs.* Wilson, 26 Pa. St., 394.

In that case the plaintiff introduced the defendant concerning a remittance of money and bills, as follows: "You can send enclosed in a letter in fifties or one hundred dollar notes on par banks." The defendant purchased three hundred dollars in bills of the denomination of five, ten and twenty and one one-hundred dollar bill, and enclosed the same by mail as he was instructed. The letter never reached its destination, and the action was brought to recover the amount on the ground that the defendant assumed the risk of the remittance by enclosing a larger number of bills and of smaller denominations than directed in plaintiff's letter.

The defence was, as usual, that the instructions were substantially complied with and that the departure, if any, was not material and did not increase the risk. The opinions of various witnesses were taken as to the relative risks of large or small packages of money sent by mail; and the jury found a verdict for the defendant.

The Supreme Court of Pennsylvania in the opinion of Lewis, Chief Judge, set this verdict aside. We quote from the opinion, *i.e.* :

"* * * The primary obligation of an agent whose authority is limited by instructions, is to adhere faithfully to those instructions, in all cases to which they ought properly to apply; *Story on Agency*, § 192. He is in general bound to obey the orders of his principal *exactly*, if they be imperative and not discretionary; and, in order to make it the duty of a factor to obey an order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. *Story on Contracts*, § 359, Brown *vs.* McGrau, 14 *Peters*, 494. It is true that instructions may be disregarded in cases of extreme necessity arising from unforseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals. *Story on Agency*, § 194. These are, however, exceptional cases. There may, perhaps, be others which have been sanctioned by adjudications, founded on the principle that the departure complained of was not material. But the general rule is as indicated in what has been said, and the case before the Court is not brought within any of the exceptions. To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions. It is not sufficient that the deviation was not material if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task, in a case like the present; but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff. To force a man to perform an executory contract after substituting for the consideration other terms than those provided for in the bargain, is to deprive him of the right to manage his own business in his own way. To do this on the ground that the departure is not material, when it is manifest that the party considered it otherwise, is a violation of private right, which leads to uncertainty and litigation without necessity or excuse."

The opinion concludes with the statement that there was error in directing the jury to find that the departure from the instructions was immaterial.

Walker *vs.* Walker, 5 Heiskell (Tenn.), 125.

Defendant was instructed to remit money by express, but though acting in good faith he remitted by check of a third party as being the safer course. Principal received the check and wrote to agent expressing his gratification at his success in collecting the money, and then endeavored to

collect the check, but the drawee had failed. The agent was held liable notwithstanding the apparent ratification.

The case considers the rules laid down in Story on Agency and Wilson *vs.* Wilson, *supra.*

Sanquer *vs.* London & South-Western Railway, 16 Com. Bench, 163.

Defendants received the goods from Morlaix upon a contract to deliver to the shipper's order at Brewer's Quay. Instead of doing this, they assumed that, because there had been previous dealings between this particular consignor and the firm of Anderson & Allen, and their goods were marked with the letter A, their usual mark, they were intended for that firm, as indeed they were, and under general request to deliver all goods intended for Anderson & Allen coming from Morlaix, at Hibernia Wharf, a part of the goods were so delivered. Had goods been delivered at Brewer's Wharf, no delivery to Anderson & Allen would have been made by the agent of the consignor unless certain sight drafts were first accepted.

Plaintiff endeavored to recover from Anderson & Allen the value of the goods thus obtained, but owing to their failure was unsuccessful, and then sued and recovered against the Railway Company.

The Court says, p. 175:

"The plaintiff had an undoubted right of action for the defendants' failure to deliver the butter at Brewer's Quay. There is no color for saying that the defendants were authorized to deliver them anywhere else or to Anderson & Allen."

Cutler *vs.* American Exchange Bank, 113 N. Y., 593, where defendant received $500 upon its promise to remit the sum to a specified person at Leadville, and it was held that the delivery of a letter of advice to plaintiffs, signed by defendant, directed to a Leadville Bank, which stated that the account of such bank was credited that day with $500 received from plaintiffs for the use of the party to

whom the money was intended to be remitted was not a compliance with its contract, and on the failure of the Leadville Bank in question, plaintiffs were allowed to maintain an action against the American Exchange Bank to recover back the $500 paid.

It will be noticed that in this case no statement was made as to the use to be made of the money, and plaintiffs accepted a form for transmission which, while worthless to them, doubtless caused a loss of the money to the Bank.

North Pennsylvania Railroad *vs.* Commercial Bank, 123 U. S., 727, enforces the obligation of a common carrier as to delivery of live stock.

The receipt specified that the cattle were deliverable to order of P. M., who was the shipper and owner, and "notify J. & W. B." at point of destination.

The delivery was made to "J. & W. B.," in accordance with a custom at place of destination, without production of bill of lading, and the Court say on this point, p. 738:

"The fact that the railroad company at Philadelphia had been in the habit of delivering cattle, transported by it, to the Blakers, through the drove-yard company, without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieved the company from liability for the cattle in this case. It was not shown that the shipper or the bank which took the draft against the shipment, or its correspondent at Newtown in Pennsylvania, had any knowledge of the practice, and, therefore, if any force can be given to such a practice in any case, it cannot be given in this case where the party sought to be affected had no knowledge of its existence."

Ellis *vs.* Turner, 8 T. R., 531, where vessel passed the point where goods were to be delivered without unloading the same and on the continuation of her voyage to a port beyond was lost.

The same principles apply to forwarding agents.

Proctor *vs.* Eastern Railway Co., 105 Mass. 512.
Forsythe *vs.* Mather, 9 Barr (Pa.), 148.

In this case plaintiff forwarded by Forsythe & Co. to Galena, Ill., from Pittsburgh, goods marked "J. F.,

Galena." Forsythe marked on the bill of lading "J. Flanagan, Galena, Ill." When they reached St. Louis they were seized by Sheriff under an execution against Flanagan. The Court says:

"The consignor and owner for some reason not disclosed, and which he is not bound to explain, chose to send the goods, without particular instructions so marked, the defendant, instead of forwarding them in the manner directed, without the shadow of authority, inserted the name of Flanagan, to whom they did not belong, and who has no pretence of right to them.

This was an assertion of ownership in him, caused by their act, of which he was so unprincipled as to avail himself.

No person can doubt of the right of the consignor to mark the goods with the initial of the name of the owner if he chooses to run the risk. That is a matter between the consignor and owner with which the consignee for transmission has nothing to do.

The parties may have had very good reasons for adopting this mode, and I am yet to learn what right others who are employed for a special purpose have to interfere in their arrangements. Goods similarly marked had gone before safely, and in all probability would have gone safely again, but whether they would or not was not of the slightest consequence to the defendants. Their duty was to forward the goods as directed."

Where, by the contract between the consignor and the carrier, the latter agrees to deliver the goods to a particular person at a particular place, their contract supersedes the necessity for showing the ownership of the goods, and the consignor may sue the carrier although the goods may be the property of the consignee.

Dunlop *vs.* Lambert, 6 C. & F., p. 627.

So where the property in the goods has not passed to the vendee,

Swain *vs.* Shepherd, 1 Moo. & Rob. 223,

or where the consignor retains a special property in the goods, or if the goods were in fact delivered to the carriers at the risk of the consignor.

Dunlop *vs.* Lambert (*supra*).

Lord Cockburn, however, says, in Simpson *vs.* L. & N. W. Co., 1 Q. B. D., 277:

"The principle is now settled, that whenever either the object of the sen-

der is specially brought to the notice of the carrier, *or circumstances are known to the carrier from which the object ought, in reason, to be inferred,* so that the object may be taken to be within the contemplation of both parties, damages may be recovered for the natural consequence of the failure of that object."

In the case now before this Court for review, it is perfectly clear that Mr. Cooper was under obligation to remit money to take up a draft maturing on the 29th February, which had been drawn on Martin, Turner & Co., and that he was remitting to them, to apply for that purpose, £5,000. The jury have found that the plaintiff in error knew such was the purpose of the remittance, and Cooper chose to direct the manner in which his money so remitted should be sent, testifying on his cross-examination and *not* on his direct, that *he had reason to suppose that it made a difference whether Martin, Turner & Co. received this money in London or in Glasgow.*

"It made every difference to me," he says: "I wished it mailed for a special purpose, because the English laws are very strict on that thing and I knew what that was, because I have had friends who have had similar cases, and I wanted that cheque mailed to Glasgow, so that my friends could use that money to take up my bills. Now, if it had not been done, or had not been in a cheque, so as to ear-mark it, as the English term it, then I might have lost it; but if it was sent in a cheque by mail, and these parties failed, I could have saved my five thousand pounds out of the estate, because my five thousand pounds could have been identified and taken out of the estate, if paid in, in case they had failed or acted dishonorably."

While he testifies he did not suppose they were about to fail and would not have sent it if he had, this did not deprive him of the right to remit in the manner he directed for the very purpose of protecting himself in case of such an unexpected contingency.

The evidence clearly discloses that he was remitting vast amounts of money through the agency of the plaintiff in error, and that it was a wise precaution for him to take to ear-mark his money, as by so doing—if by any chance his principal should fail—it would be saved; and such, on the evidence, was the necessary result. Many, if not all his remittances, as shown by the evidence, were for the special

purpose of taking up bills he had drawn. The money remitted was clearly his and clearly remitted to Martin, Turner & Co. to use for him in taking up the bills.

Had this money gone up by mail to Glasgow, it could not have been received until the 28th. Cooper knew his bill matured at London on the 29th.

Why, if it made no difference to him, did he require this cheque to be sent by mail to Glasgow, knowing that it must be sent back to London to retire his bills, unless he intended to keep his remittances separate from the general funds of Martin, Turner & Co.?

The evidence shows that he had arranged a cable address for Martin, Turner & Co. at London, with the plaintiff in error, and had he desired them to get the control of this money at London, he would have directed the Bank of British North America to pay it to them there and not at Glasgow.

Whatever his motives, it is respectfully submitted that it was his *right* to direct the plaintiff in error where the money should be paid, and they disobeyed such instructions at their peril.

SECOND POINT.

This is not the case of a mere consignment of goods, but a case where the party remitting was known to the agent as the owner or interested in the application of the money, and the agent received it and contracted to carry out specific instructions as to time, manner and place of delivery.

The entire argument in the Court below, and mainly on this appeal, is addressed to the proposition that Martin,

Turner & Co. had some right to control the disposition of this money from the moment it passed into the hands of the agent at New York.

If it were the right of Martin, Turner & Co. to direct the agent at its office in London to pay the money to them at London, without the knowledge of Cooper, then that firm would have the right to demand and receive payment of the money at the City of New York without the knowledge of Cooper, as was the case in Southern Express Company *vs.* Dickson (*supra*). Either the plaintiff in error contracted with the defendant in error as principal and agreed to carry out his instructions—and was bound to do so—or else the money was Martin, Turner & Co.'s from the moment it was lodged in its hands at New York. Either the plaintiff in error was bound to follow instructions received from Cooper, with whom it contracted, or it was bound to follow instructions received from Martin, Turner & Co.; for, if Martin, Turner & Co. were entitled (as is claimed) to this money as matter of right and it became theirs from the time it was paid to the plaintiff in error, then a delivery back, or a receipt, or instructions of any kind from Mr. Cooper concerning it, would have been at the risk of the plaintiff in error, when Martin, Turner & Co. should have seen fit to prosecute them for violation of duty.

Such was the case of Thompson *vs.* Fargo, 49 N. Y. 188, where the plaintiff who had been employed by soldiers having claims for back pay to collect the same had done so and given the money to an express company addressed to the soldiers at their supposed places of residence.

The case concedes that if the plaintiff had owned the money, or had any special interest in it, he could have recovered it back, but being a mere agent fulfilling the instructions of the owners, and sending the money, his duties and liabilities were discharged, and he had no further right or interest in the matter. And the Court says:

"* * * It is the right and interest of the defendant to see that the

package is delivered to none but the true owner. A wrongful recovery against this defendant will afford it no defence as against the true owners or their representatives."

In the case at bar the money was Cooper's. The purpose for which he remitted it was communicated, and it would have been his right at any time to have taken it back from the Bank of British North America until it had fully complied with the instructions he had given.

Martin, Turner & Co. had no right, title or claim to the money, not even a special property in the same, nor were they the consignees. They were simply the parties designated by Mr. Cooper to receive and apply this money for the purpose for which it was remitted, and this being the the case his right to control the manner and place of delivery is, we respectfully submit, unquestioned. The evidence of Martin, Turner & Company is in accord with Mr. Cooper's claim.

Martin says, on his cross-examination, referred to by plaintiff in error :

"I did not know otherwise than by communication from the plaintiff for what purpose the said amount was remitted, and I did not have any communication on this subject other than by letter or telegram or cablegram. We knew that a remittance of five thousand pounds was coming to retire this bill, but I cannot put my hands upon any letter which intimated that. This transaction came under a general arrangement with the plaintiff by which he was to draw bills upon our firm and retire them at maturity by renewals until he provided for them by the sale of produce consigned to him by our foreign branches, and against which the original bills were drawn."

No claim whatever is here made that Martin, Turner & Company were to pay the bill out of their own funds. Nor is it pretended that the money remitted by Cooper belonged to them. The evidence is plain and distinct that a remittance was coming to retire the bill, namely : That the purpose of the remittance was to retire the bill, and that there was a general arrangement by which Cooper was to retire such bills at maturity by renewals until he provided for them by the sale of produce consigned to him.

Now had this money that Cooper was remitting been the proceeds of the sale of produce belonging to Martin, Turner

& Company, the money would have been theirs, and their receipt to the bank of British North America, or any bank, might have been its full discharge. But, whatever may have been the ultimate expectation, the evidence is clear that the money so remitted was Cooper's ; even though he had raised it by drawing other bills upon Martin, Turner & Company, on which he likewise stood liable as drawer.

As a matter of fact, if it were material to this discussion, Martin was mistaken in the assertion that Cooper was under an obligation to retire these bills by renewals until they were provided for by the sale of produce.

In this aspect he is at variance with Cooper, who testified that he told the agent of the Bank of British North America he always took up these bills at maturity, and that the very cables that he had bought and was buying of them that day was to take up one of those five thousand pounds bills (see page 15, fol. 39).

The fact was, if the exact status of the parties were inquired into, that Martin, Turner & Company had no goods in Cooper's hands out of which he could ever retire any bills he drew. All goods that they shipped to this market were billed to various banks who had advanced the full value of the goods. Cooper would advance the duties and freights upon the goods for the account of the banks, for whom he held the goods as trustee, and he put himself in funds to carry on this enormous business by drawing from time to time on Martin, Turner & Company under letters of credit they sent to him, and under his agreement to retire such bills at maturity, which he always did, and would have been able to recoup himself in the end out of the goods he held of the various banks who had title to the same, except for the fact that in this instance he had to pay the bill twice, by reason of the default of his agents, the Bank of British North America.

That the above is a correct statement of the affairs of the parties, will be easily ascertained by your Honors on refer-

to the case of Cooper *vs.* The Hong Kong & Shanghai Banking Corporation (107 N. Y. p. 282).

That Cooper lost his five thousand pounds which was remitted to take up this particular bill, and that he afterwards had to pay it is shown at fol. 57, p. 24, where it appears that out of eighteen thousand pounds of such bills, he had at the time of the trial, paid thirteen thousand pounds, and received indulgence from the holders for the balance.

The cases, therefore, which justify a carrier in the delivery to a consignee where they have no notice of the special interest of the consignor, are not applicable to the rights of the parties in this litigation, but even in such cases, if the agent or carrier has knowledge of any special interest of the consignor in the property, he is bound to be exact in carrying out the instructions of the consignor.

Such would have been the decision in Cork Distilleries Company against Great Southern &c., Company, Law Reports, 7 English and Irish Appeals Cases, 269, if the evidence had permitted the finding that the carrier had information of the exact relations existing between the parties.

The rule of law, stated at the outset, is carried out in the Bank of Attica *vs.* Metropolitan National Bank, 97 N. Y. 639. In that case the plaintiff sent to the defendant five drafts for collection secured by bills of lading, to each of which was attached a notice to the consignee that freight charges and demurrage, to an amount specified, were payable by check to defendant's order. That the defendant received such check, but appropriated the same by the direction of the acceptor of the drafts, and contrary to plaintiff's instructions, to the payment of other drafts accepted by him which belonged to plaintiff, and were in the hands of defendant for collection. It was claimed on appeal that inasmuch as the money ultimately went to the plaintiff it had not been damaged, and on this point the Court says:

"The finding of the Referee is that the defendant undertook to collect for

the plaintiff certain drafts, and did so, but applied the proceeds in a manner not authorized by it. The evidence sustains this conclusion. He also finds. however, that those proceeds were in fact applied by the direction of another party to the payment of certain other commercial paper then held by the defendant, but belonging to the plaintiff, and so the defendant contends that there has been no damage. This does not follow. The object sought by the plaintiff in conveying special instructions to the defendant as to the disposition of the money has not been attained, and in that is an apparent loss. * * * It is enough that the defendant took the risk of obeying a person who had no right to direct."

The rule of law invoked by the defendant in error in this case, though in some instances severe, is certain, and is recognized as a rule of commercial law and upon such questions uniformity of decision and certainty of action is a conceded requisite.

All the cases which sustain the contention of the defendant in error in this action may be, and doubtless were, claimed by the agent violating his duty to be cases of hardship, but the Courts have not hesitated to hold the agent to his full responsibility.

Thus, in Goodrich *vs.* Thompson, 44 N. Y. 325, where the contract was to ship goods by a specific vessel which did not sail, and the agent sent the same by another vessel which was wrecked and the goods thereby lost, the agent was held liable.

And yet it cannot be seriously contended that, had the facts in the case been laid before the plaintiff, he would not have justified the change.

So, in Johnson *vs.* N. Y. C. & H. R. R.R. Co., 33 N. Y. 610, the carrier agreed to forward by the People's Line of steamers, who declined to receive the goods, when they were forwarded by the carrier on a tow boat which, although in good condition, was lost.

In that case it was plain that the carrier did what he thought best for the interests of his consignor, but the rule of law was nevertheless applied.

So, in Scott *vs.* Rogers, 31 N. Y. 676, the agent was instructed to sell a quantity of wheat on a certain day at a

fixed price. On that day the agent offered the wheat at that price, and gave the would-be purchaser until the next morning to decide whether he would purchase at that price, provided no news was received to change the price; on the following morning the sale was made, but the plaintiff was allowed to repudiate the sale, and hold the agent liable for damage in a considerable rise which came afterwards.

In Crawford *vs.* The West Side Bank, 100 N. Y. p. 50, a depositor in a bank drew his check for a certain sum, payable to one of his clerks, to enable him to pay wages. The clerk altered the date and drew the money. The bank was held liable by reason of such alteration.

In that case the depositor intended this clerk to get the money. The check was drawn in his favor, and he filled in a date, to wit, the 22d of April, and the only change the clerk made was to make that date the 21st when he drew out the money.

And so the Courts have not hesitated to hold that the fact that money is desired not to go into the hands of the parties to whom it is intended to be remitted until a fixed date, is material, and that the agents who transgress such instructions, and place the money in the hands of a person to whom it is to go to at an earlier period, shall be responsible for any loss resulting therefrom.

Muller *vs.* Pondir, 55 N. Y. 325, cited by plaintiff in error, is a direct authority for Cooper's contention that the Bank of British North America was his agent, and that he, and not Martin, Turner & Co., could take the £5,000 out of the agent's hands before delivery as directed.

In Muller *vs.* Pondir plaintiff had drawn bills at Havana on London, and was remitting a part of the proceeds in bills of exchange to Schepeler & Co. at New York, at whose instance and request he had drawn the bills on London, and who were to provide for the payment of the bills in London. The bills so being remitted were payable to a clerk of Schepeler & Co.

Schepeler & Co, failed a day or two after the transaction,

and against their *bona fide* transferee of these bills, made, however, in advance of their arrival, Muller was allowed to assert his right to reclaim the bills before actual delivery to Schepeler & Co.

Muller was, of course, liable on the bills he had drawn on London, and as to the proceeds he was remitting to Schepeler & Co., the Court say, p. 341 :

> " The bills in controversy were, at all times, up to the time of the com-
> " mencement of this action, in the actual or constructive possession of
> " the plaintiffs. The purser of the steamer, to whom he delivered the
> " package in which they were inclosed, was agent of the plaintiff. He
> " received the package from the plaintiff with special directions to deposit the
> " same in the post office in New York City, and those directions were revoc-
> " able by the plaintiff at any time. He could have recalled the package
> " before the steamer sailed, and could he have overtaken the steamer in mid-
> " passage to New York, the same right would have continued, and had he
> " met the purser as he stepped on shore on his arrival in New York, he would
> " have been subject to the direction of the plaintiff in respect to the package."

The deposit by the Bank of British North America of its check in the mail, in favor of Martin, Turner & Co., would not have vested title to the amount represented thereby, in Martin, Turner & Co. The payee of a check cannot enforce its payment against the bank on which it is drawn.

1st National Bank *vs.* Whitman, 94 U. S. 343.
Attorney General *vs.* Continental Life Insurance Co., 71 N. Y. 325.
Ætna National Bank *vs.* Fourth National Bank, 46 N. Y. 82.

The mailing of the check was merely one of the steps in the transfer of the funds which Mr. Cooper was seeking to send, in the shape of such check, to Martin, Turner & Co. at Glasgow. The agency of the bank would still have been in existence and Cooper could have stopped the actual payment of his money at any time until the check had been cashed, or it had been transferred to a *bona fide* holder.

Indeed, in Muller *vs.* Pondir (*supra*), the bills of exchange were actually stopped in the post office at New York.

Martin, Turner & Co. would not become creditors of the Bank of British North America by the mere mailing of such check. Their right to receive the check was wholly subject to the exercise of Cooper's power of revocation of the orders he had given as to its delivery until such delivery was actually accomplished.

THIRD POINT.

The agent cannot defend on the ground that his principal may not have been damaged by the diversion. He can only make such defense on establishing that no loss has occurred. The moment that it is shown that there has been a deviation from instructions and that loss has followed, his liability is fixed and cannot be met by the suggestion that if there had been no deviation there might also have been a loss.

This is the doctrine of Isaacson *vs.* The New York Central and Hudson River Railroad, 94 New York, 278, and the cases there cited and considered, and kindred cases. It is a defense which has been made as often as liability has been enforced in this class of cases, and has, we respectfully submit, been uniformly overruled. The argument that is advanced in this case is that the money would not have been lost at all if Martin, Turner & Company had not

failed; and that if such event had not happened the violation of instructions, which is substantially conceded by the plaintiff in error, would have worked no harm to the plaintiff. That such is the fact may be conceded, for it is apparent that from the month of July, 1883, to the month of February, 1884, all remittances that had been made by the defendant in error, and which he was contracting with the plaintiff in error to remit to Glasgow by mail or telegraph, had in violation of such instructions been paid to the Bank of Scotland, at London, to the credit of Martin, Turner & Company, and it was because there had been no loss the defendant in error did not learn of such violation of instructions. It is not until some event which may or may not have been foreseen by the principal occurs which causes loss that the question of the defendant's liability arises; and when by the violation of such instructions it is shown that a loss has arisen which might not have otherwise occurred it is respectfully submitted that the law is well settled that without further proof on the part of the principal the defendant's liability is fixed. But in this case the defendant in error went further and showed that on the very morning of the day when his draft would have reached Glasgow if it had been sent in accordance with his instructions, or on the succeeding day another draft was received by Martin, Turner & Company and applied for the purpose for which it was remitted, Campbell saying (fol. 101, p. 47):

"I now recall to mind that a remittance was received by my firm on the 28th of February for a specific purpose and was so applied."

Martin saying (fol. 75, p. 34):

"No money was received by our firm on the morning of the 28th, but on the 29th we received from A. R. McMaster & Bros., on account of Mr. Cooper, a draft for £4,000, to retire a bill of Mr. Cooper's for the same amount falling due on the 3d of March, which was applied for that purpose."

And the evidence is all on one side that if this draft had been sent in accordance with the contract made it

would have been applied for the purpose of taking up the draft, to protect which it was remitted. The defendant in error, therefore, went further than he was bound to do, and established that his money would not have been lost if his instructions had been obeyed; and yet your Honors are asked to go into an investigation of the rights that may be conferred by the Bankrupt Law of England, and to determine that it made no difference under such bankrupt law whether the £5,000 was in the form of a debt still unpaid from the plaintiff in error; in the form of a check on another bank, inclosed in a letter; or in the form of an indebtedness from the Bank of Scotland; and it is asserted that the Bank of Scotland had no right to assert a lien against the fund; and that the retention of the money by the bank was without right if impressed with the trust, unless the bank parted with value after its receipt, which the defendant in error does not show. In other words, it is urged as a defense to this action that before Mr. Cooper can assert his claim against his principal for violating his instructions, by reason of which the £5,000 was not applied for the purpose for which it was remitted, he must first contest with the Bank of Scotland, in London, its right to retain a sum remitted for a specific purpose, which, so for as it was concerned, came rightfully into its hands, and so far as the defendant in error is concerned was wrongfully placed there by the Bank of British North America.

In this regard, it may be well to call to your Honor's attention one of the letters in evidence in this case, written by Mr. Cooper to the defendant on the 24th of April, 1884.

"I give you this notice at the earliest moment, in order that you may, if possible, follow the money into the hands of the Bank of Scotland, who doubtless appropriated it without making any advances upon the faith of the deposit in favor of Martin, Turner & Company."

And we respectfully submit that if the propositions of law advanced in this regard be correct, there can be little hardship to the plaintiff in error in paying this judgment;

for it will follow that if this fund can be recovered back as against the Bank of Scotland, that all such rights are available to and by the plaintiff in error and it may, if it has not already, fully recouped its apparent loss.

If the money could be followed into the Bank of Scotland by any party, that party was the Bank of British North America. As between the plaintiff in error and the defendant in error, the money was not paid to Martin, Turner & Company, but was paid in error to the Bank of Scotland.

Some authority to sustain a claim at the suit of the plaintiff in error to recover back the money, though not against a banker, is found in the opinion of Lord Mansfield, in Buller *vs.* Harrison, Cowp., 565. While the recovery there permitted might not now be allowed, the principle laid down in that case, that payment to an agent is not in all cases a payment to his principal, is still good. The case went off on the ground that the agent, having merely credited the money to his principals on a past indebtedness, was still the holder of the money.

FOURTH POINT.

The £5,000 was lost through the neglect of the plaintiff in error to follow the instructions given by the defendant in error.

As a matter of fact, the Bank of Scotland appropriated it on account of an ordinary customer's indebtedness in an open running account.

Whether the Bank of Scotland had the right to so appropriate the money or not would seem to be immaterial to the right of recovery of Mr. Cooper in this case.

Inasmuch as the plaintiff in error paid the money to a

party not entitled to it and such party retained the money the same was lost to the true owner, and the law does not place upon him the duty of following the wrong-doer with all the risks of defeat and insolvency in a foreign land.

But the Bank of Scotland had the right to retain the £5,060.

The evidence shows that the money was received by it without notice or advice that Mr. Cooper was in any way interested in the same, or that the same had been remitted to the Bank of British North America by Mr. Cooper, nor was it informed that it was put to the credit of Martin, Turner & Company for his account (page 37, folio 81). The letter enclosing the money was merely to the effect that the cheque was enclosed for the credit of Martin, Turner & Co., Glasgow.

The evidence conclusively shows that the Bank of Scotland kept an open running account with Martin, Turner & Co., at both its agency in London and at Glasgow; that they had mutual dealings with one another; that the account was the original account of a depositor in a bank. This money in suit being received as above, on the 27th February, was credited by the Bank of Scotland to Martin, Turner & Co.

The account appears at page 37, folio 82.

While there remained a credit balance to Martin, Turner & Co. of £8,039 to the 7th March, it was at that date transferred to that part of the account kept at Glasgow, and both Martin and Campbell testified that the money was retained by the Bank of Scotland which was a creditor of their estate. (Page 34, folio 75. Page 47, folio 102). The words of Campbell being: "As my firm were indebted to the Bank of Scotland to a considerable extent I suppose they retained this sum to lessen their loss." And those of Martin being: "It was retained by the Bank of Scotland, which was a creditor of our estate."

The law seems to be well settled in this Court and in England that, where there are open mutual dealings

between bankers or between bankers and their depositors, that money placed with the bank by or for the account of such depositors without notice of the interest of any other person can be retained for account of the bank, no matter who may be the real owner of the money.

We suppose it can make no difference that the Bank of Scotland kept an account in two places with Martin, Turner & Co., in the application of these principles.

The Bank of the Metropolis *vs.* The New England Bank, 1 Howard, 234, is, we respectfully submit, decisive of the principle above stated. It was there held that where there had been mutual dealings between two banks and an account current kept between them, in which they mutually credited each other with the proceeds of the paper remitted for collection, &c., and there was no notice that the paper remitted belonged to any other person than the bank remitting the same, that there was a lien for the general balance of account on the paper thus remitted, no matter who might be its real owner.

This Court, as we understand it, has steadily maintained that the receipt of commercial paper or money, under such circumstances, without notice of the equity of any third person therein, constitutes a *bona fide* transfer, even though the transfer is merely as security for an antecedent debt, and that in such case the *bona fide* holder is not affected by the equities or right of prior or third parties of which he had no notice.

We are aware that the rule of law in some of the States, particularly in the State of New York, is to the effect that some advance should have been made, or value of some kind parted with on the faith of the transfer, but such is not the law as held by this Court.

We refer to Railroad Company *vs.* National Bank, 102 U. S., 42, as settling the rule of law upon this question in the United States, and the opinion in that case distinctly states that the law of England is the same.

The authorities as to the rights of a banker go even

further, sustaining the contention that the right to retain a deposit or a remittance, as a *bona fide* holder, by a banker, applies not only to a credit given on the security remitted when in possession, but also when in expectancy.

Russell *vs.* Hadduck, 3 Gilman, 233, 238.
Fourth National Bank *vs.* City National Bank, 68 Illinois, 398.

Indeed, the case of Reynes *vs.* Dumont, 130 U. S., p. 354, sustains these principles, and would be conclusive authority in favor of the Bank of Scotland as against any claim to recover back from it the £5,000.

The banker's lien sought to be asserted in that case was only defeated because it was held that the securities were with the banker on a special deposit inconsistent with the right to a lien.

But as to the general principle that we have above stated, this Court, in that case, says, at page 391:

"A bankers' lien, said Mr. Justice Matthews, speaking for the Court in National Bank *vs.* Insurance Company, 104 U. S., 54, 71, 'ordinarily attaches in favor of the bank upon the securities and moneys of the customer, deposited in the usual course of business, for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion.'"

Then follow quotations from *Re* Bank of Metropolis *vs.* New England Bank, 1 How., 234, 239, and other cases. And the opinion then—upon the question of the assertion of the banker's lien, at page 393—denies it in these words:

"* * The bonds were not lodged in the hands of the Schuchardts in the ordinary course of banking business. They were sent to New York for a specific purpose, and, when that purpose was accomplished, permitted to remain for 'safe keeping,' and because New York was a better market than New Orleans and the express charges for their return very heavy, as is said on one side; and for convenience in procuring loans, as is asserted on the other."

Ex parte Kelly & Co., L. R., 11 Ch. Div., 306, arose out of relations similar to those existing between Cooper and

Martin, Turner & Company. In that case money was remitted by Kelly & Co. to a London firm, to meet drafts drawn on it by Kelly & Co. The firm suspended, and, as against their general estate, on a withdrawal and special deposit by the bankrupts prior to filing petition of sums equaling those remitted, it was held that Kelley & Company should be protected and the special deposit applied to take up the bills they had drawn.

But as against £2,000 of such moneys that were deposited to the credit of the bankrupt's general account with the London Joint Stock Bank, it seems to have been conceded that such bank could assert its general lien for moneys due it from the bankrupts, and Kelly & Company were only saved as to such £2,000 by the bankrupt's setting apart an equivalent sum out of other moneys prior to the filing of liquidation petition.

FIFTH POINT.

The verdict of the jury settled all the facts in dispute between the parties, so far as there was evidence justifying the submission of such questions to the jury.

It is rare that a case is presented where the issues are more plainly marked on which there is dispute than in the case at bar. Cooper and Walker say one thing; McTavish says another. Upon a great number of the most material points Cooper and Walker are sustained by the records in the case.

The suggestion contained in the brief of the plaintiff in error that the present claim of Mr. Cooper's was an afterthought, was one made and addressed with force to the jury and called to their attention by the trial judge (fol. 115), but which can have little weight in this tribunal. Cooper, under a charge by no means favorable, and carrying the burden of proof, satisfied twelve men that his version was correct; and criticism of his integrity and conduct might well have ceased after the jury had made its finding. He told a plain and straightforward story, and it was believed, and it is respectfully submitted this Court will not interfere with the finding. The Supreme Court of the United States will not review the weight of evidence, and will not interfere with the verdict of a jury, unless there is no evidence in the case to sustain it.

Lancaster *vs.* Collins, 115 U. S., 222.

SIXTH POINT.

The Exceptions of the Plaintiff in Error.

The case is almost barren of exceptions. Not one is taken to the reception of evidence, and no proper one to the charge of the Court. The exceptions appear at page 49. The first is a motion to strike from the case all the oral evidence as to the contract, on the ground that Exhibits 1 and A are in writing and the best evidence of what the transaction was. There are two answers to this motion. The first is that there was never a written agreement signed between the parties and which embodied their oral communications. The evidence shows Exhibit 1 to have been merely a receipt issued for the money paid; and Exhibit A to have been a memorandum of instructions written out by the plaintiff in

error, in so far as the case shows, without the knowledge of the defendant in error. Secondly, the oral evidence received was not to vary or contradict the terms of the instruments in question. Both the receipt and the instructions written out by the plaintiff in error show that this money was to be sent to Martin, Turner & Company, Glasgow; and it was perfectly competent to show anything which made this receipt and this memorandum more plain. The further evidence merely went to the extent of showing that the plaintiff in error was advised as to whom the money belonged, and of the purpose for which it was remitted, which was consistent and not inconsistent with the receipt and the memorandum; and it also made more plain the meaning of the address "Martin, Turner & Company, Glasgow." Not one word of evidence received tended to vary or alter these instruments; nor was any objection made to the receipt of the evidence when it was offered.

The next motion was to direct a verdict in favor of the defendants in the case, upon the ground that, under no aspect of the case, was there any such specific appropriation as between the sender of this money and the person who was to receive it as to change the attitude of the parties in reference to the insolvency which ensued to Martin, Turner & Company and the bankruptcy which followed the contract. The precise meaning of this request is not apparent to the defendant in error. There was or there was not a specific appropriation of the money. The plaintiff in error did or did not know that it belonged to Mr. Cooper, and was being remitted for a specific purpose. And the evidence of Mr. Cooper and of the members of Martin, Turner & Company clearly shows that he had promised to remit, and they expected him to remit money for such purpose. This, therefore, we submit, is a question of fact which could only be found one way, as there was no evidence to the contrary. The attitude of the parties in reference to the insolvency of Martin, Turner & Company and the bankruptcy which followed, was not changed, and no

one sought to have it changed. The plaintiff in error was liable upon every one of the remittances that Mr. Cooper had made to Martin, Turner & Company at Glasgow, and which it failed to pay in accordance with the instructions given, and it only escaped liability because no loss arose and Mr. Cooper did not learn of the violation of his instructions. There was no change in the attitude of the parties. The attitude always was that Cooper had a right to have his money remitted to Martin, Turner & Company at Glasgow, by mail or telegraph, as he directed in each case, and if the money was once so paid, he thereafter assumed the responsibility of the loss and not the plaintff in error; but until it was so paid the attitude of the plaintiff in error toward him was to pay it to Martin, Turner & Company at Glasgow, by mail, and it could not discharge itself from liability until this was done.

The third request was to instruct the jury to disregard all oral evidence to vary or modify the transaction of the 26th of February, 1884, as represented by the order and receipt. It is sufficient to say that the Judge's charge nowhere submits to the jury the consideration of any question varying or modifying the order and receipt. On the contrary, the evidence simply extends and makes that which is incomplete complete; and the proposition is already answered by the argument against the first exception.

The general rule, that parol evidence is not admissible to vary, alter or contradict a written instrument, has no application here.

The rule has no application to a writing which is merely evidence of a fact and not of a contract or right.

M'Crea *vs.* Purmort, 16 Wend., 460.

In this case Cowen, J. says, p. 473,

"Another principle is, that wherever a right is vested or created, or extinguished, by contract or otherwise, and writing is employed for that purpose,

parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument; but that any writing which, neither by contract, the operation of law or otherwise, vests or passes or extinguishes any right, but is only used as evidence of a *fact*, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Receipts and other writings which only acknowledge the existence of a simple fact, may be susceptible of explanation and liable to contradiction by witnesses."

Neither of the papers in evidence in the case at bar forbid the introduction of oral evidence of what the agreement or contract between the parties was. Such papers do not create or vest or extinguish a right, nor do they, either of them, by operation of law or otherwise, pass any right.

The first of them is a mere bill (fol. 16) and the second (fol. 64-65) is not claimed by the very witness who wrote it to be more than a memorandum of a transaction past and concluded, before the time it was made, unsigned by either party, and kept in the possession of the one who wrote it.

There is no element of a contract about it. There is no element of estoppel against the defendant in error about it. It does not appear that Mr. Cooper even knew of its existance. There is no evidence when it was written.

But the fact that Mr. McTavish wrote the memorandum, after the conversation, not requiring Mr. Cooper's signature, shows that the agreement had already been made and in the absence of any evidence to show that it was the intention of Mr. Cooper that the oral contract should be committed to writing and that the latter should be the contract, the writing itself would have been incompetent evidence of what the agreement was, if objected to by the defendant in error on the trial.

But it is not sought now, nor was it upon the trial, to vary or contradict anything expressed by the writings, by oral evidence of the transaction.

The plaintiff in error contends for a conceded rule of law, that in the absence of anything which should lead a carrier to suppose that the consignor is the owner of

goods consigned, the carrier may treat with the consignee as the owner.

That this rule can be rebutted we have elsewhere shown. To show by parol evidence that as a matter of fact the carrier did have reason to suppose that the consignor was the owner; nay, more, to prove as the defendant in error did upon the trial, that the agent was particularly informed of the ownership of these funds (which it admits is the case, fol. 79, p. 35, and fol. 92, p. 42); to show this would not vary or contradict the terms of a written contract, supposing there to have been any written contract at all.

To admit that the presumption which we never disputed *can* be rebutted, is to concede that parol evidence, so far as bills of lading and similar instruments are concerned, must be admitted in the great majority of cases in order to impute the knowledge to the carrier, which is to rebut the presumption.

If there had indeed been in the case at bar, a conceded contract in writing expressing no more than do the writings in this case, the defendant in error would have had the right to show by any evidence in his power, that the plaintiff in error actually knew the facts which would rebut the presumption of law (supposing it to have any application to this case), that Martin, Turner & Co., were the owners of the £5,000.

But to say that there is a rule for the construction of an instrument, and also an exception to the usual rule in the construction of the same instrument, is to say that the same instrument is capable of two constructions.

To ascertain which is the correct construction, proof of the knowledge possessed by the parties at the time of making the instrument must be given, and whether the parties actually were in possession of the requisite knowledge was for the jury to determine from such evidence as could be placed before them, of the surrounding circumstances and the *res gesta* and the conversations, which were the media of such knowledge.

The case of Messmore *vs.* N. Y. Shot & Lead Co., 40 N. Y. 422, is in point. It was there held that where the parties had contracted in formal writing for the manufacture and delivery of lead bullets, that nevertheless it was competent for the plaintiff, alleging and suing for damages for breach of the agreement, to show orally, that the defendant was informed of the object of the plaintiff in making the contract, and that it was to fulfill an existing contract of the plaintiff, because it showed that the profits the plaintiff was to make were in the contemplation of the parties on entering into the contract.

And we submit, assuming for the sake of argument, that there was a valid contract in writing between the parties, yet, that oral evidence to show the knowledge of the plaintiff in error of the situation and intentions of the defendant in error at the time of making the contract, was pertinent, and strictly admissible as bearing on the question of damages. The admission or rejection of such evidence would mean, respectively, a recovery of damages in the amount of the judgment actually rendered, or one in the amount of $\$2\frac{00}{100}$, the mere cost of the cablegram and exchange.

Baldwin *vs.* U. S. Tel. Co., 45 N. Y. 744.
Messmore *vs.* N. Y. Shot Co. (*supra*).

In the leading case of Griffen *vs.* Colver, 16 N. Y. 489, the rule is thus carefully stated by Selden, J. :

"The party injured is entitled to recover all his damages, including gains prevented and loss sustained, and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; and they must be certain."

And see the leading case of Hadley *vs.* Baxendale, 9 Exch. 341.

The general rule is, as stated by Mr. Wharton, that parol evidence cannot be received to vary the terms of a writ-

ten document. But the distinction is at once noticed between *dispositive* and *non-dispositive* documents.

Wharton's Evid., § 920.

Sir James Stephen says:

"Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract or other disposition of property."

Steph. Ev., Art. 90.

The memorandum receipt given by the plaintiff in error was non-dispositive, and was simply a receipt which under elementary rules of evidence may always be explained.

But this receipt was not signed by plaintiff in error. To make a written contract there must be written assent by both parties, and where a written proposal is accepted by parol, this is an oral contract and may be proved by parol.

But even the incidents of a bilateral contract may be sustained by parol proof.

Receipts, says Wharton, § 1064, being informal and non-dispositive writings, may be modified, explained or impugned by parol.

Thus, where a contract of carriage is made by parol, its terms may be shown, although they contradict the terms of a bill of lading given in evidence.

Mobile R.R. *vs.* Jurey, 111 U. S. 584, where it was held in an action by a shipper, that the fact that a railroad company gives a shipper a bill of lading when the goods are delivered, does not preclude the shipper from showing, where such is the fact, that the bill of lading does not express the terms of the transportation contract.

Also that a Court instructing a jury as to the construction of a writing offered in evidence as a contract, should take into consideration not only the language of the paper, but the subject-matter of the contract and the surrounding circumstances.

Id.

Mr. Justice Woods, writing the opinion, says, speaking of the plaintiff in error's contention that the bill of lading could not be varied by parol evidence:

"Before this rule can be applied, the contract in writing must be shown to be the contract of the parties. One of the vital questions in the case was, what was the contract between the parties? The defendant in error insisted that the contract between them and the railroad company was by parol, and denied that the bill of lading was the contract. It is plain upon this statement of the controversy that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding as detailed by the witnesses, or the bill of lading expressed the agreement of the parties. The contention that this evidence should be excluded, is certainly not based on any solid ground."

Starkie says:

"That whenever written instruments are appointed, either by the requirement of law or by the compact of the parties, to be the repositories or memorials of truth, they cannot be contradicted by parol evidence. But parol evidence is admissible to apply a written instrument to its proper subject-matter, or to rebut a presumption arising intrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but is essential in order to give the instrument its legal effect."

The rule has no application unless the writing be intended by the parties to embody the agreement.

Where the terms of a verbal contract of sale are afterwards put in writing by the vendor or his agent, as a memorandum of the transaction, but are not signed by the other party the rule does not apply.

Allen *vs.* Pink, 4 M. & W., 140.

Where a horse had been sold with a warranty and a memorandum made as follows, by the vendor, "Bought of G. Pink, a horse for the sum of £7. 2. 6. G. Pink."

Lord Abinger says:

"It is quite true that if there had been a parol agreement, which is afterward reduced by the parties to writing, that writing must be looked to alone to ascertain the terms of the contract, but the principle does not apply here; there was no evidence of any agreement by the plaintiff that the whole contract shall be reduced into writing by the defendant; the contract is first concluded by parol and afterwards a paper is drawn up, which appears to have been meant simply as a memorandum of the transaction."

So in Dalison *vs.* Stark, 4 Esp., 163, where an order was given verbally for goods, and the person to whom it was given put down the terms of it in writing as a memorandum, but it was not signed by the person ordering the goods, the terms of the order may be given in evidence, without producing the writing.

So also Mr. Starkie says, p. 716, 10th Amer. Ed.:

"Parol evidence is admissible to prove a fact by virtue of its own weight and authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact."

The taking of a receipt on payment of money does not preclude proof of such payment by other means.

Berry *vs.* Berry, 2 Harris, 440.
Higgins *vs.* Pryor, 3 Port., 630.
Dana *vs.* Boyd, 2 J. J. Marsh, 587.

Conversations occurring during the negotiation of a loan, or other transactions, as well as the instruments given or received, being part of the *res gestæ*, are competent evidence to show the nature of the transaction and the parties for whose benefit it was made, where that fact is material.

National Bk. *vs.* Kennedy, 17 Wall., 19.

Where papers or documents are introduced collaterally in the trial of a cause, the purpose and object for which they were made, and the reason why they were made in a particular form, may be explained by parol evidence.

Papers or documents are *collateral* when they are not the basis of the action.

Allen *vs.* Pink, 4 M. & W., 140.
Shore *vs.* Wilson, 9 C. & F., 566.

In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it

refers, or may probably have been intended to refer, or which identifies anything or person mentioned in it.

Brent's Exors. *vs.* Bank, 1 Pet., 89.

Juilliard *vs.* Chaffee, 92 N. Y. 535.

A party may always show by oral evidence that the object and design of a written instrument were different from what its language, if alone considered, would indicate.

In this case the agreement was not reduced to writing. It was intended to rest in parol, and the written instruments were subsequently signed by one party only in part execution of the parol agreement and not for the purpose of putting that agreement in writing.

It is well settled that a written instrument, thus executed, does not supersede a prior parol agreement.

Hutchins *vs.* Hubbard, 34 N. Y. 24.

Johnson *vs.* Hathorn, 3 Keyes, 126.

McCullough *vs.* Girard, 4 Wash. C. C., 289.

Mowatt *vs.* Ld. Londesborough, 3 Ell. & B. 307.

Barker *vs.* Bradley, 42 N. Y. 319.

Referring, now, to folios 64–65 it appears that there was *no* order given by Cooper for this cable transfer in writing, but that the plaintiff in error made out a memorandum of the transfer. This memorandum was produced by the counsel for the plaintiff in error, for the first time, after Cooper had, without objection, produced the testimony as to the *res gestæ*.

The plaintiff in error cannot now object to this oral evidence, even if it be objectionable on the ground urged.

Moreover, at folios 84–85, counsel for plaintiff in error, on direct examination of Mr. McTavish, went fully into the conversations respecting the transaction between Cooper and McTavish, and at fol. 50, p. 21, he cross-examined the witnesses of the plaintiff below on the same subject, all the time having this memorandum in his possession.

He should not now be heard to complain of that testimony.

People *vs.* Weldon, 111 N. Y. 569.
Matter of Morgan, 104 *id.* 74.
Quin *vs.* Lloyd, 41 N. Y. 349.
Greenleaf's Lessee *vs.* Birth, 5 Pet. 131.

Further, the receipt and memoranda being prepared by plaintiff in error will be construed less favorably to it than to defendant in error, on the ground that if there be any ambiguities they should be construed against the writer.

To this effect see

Noonan *vs.* Bradley, 9 Wall. 394.

where the Court says, at page 407:

"If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which should be more to the advantage of the defendant upon the general ground that a party who takes an agreement *prepared by another*, and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument *favorable* to him * * * *"

See also on this point,

Hooper *vs.* Wells, Fargo & Co., 27 Cal. 11.
St. Louis, &c., R.R. Co. *vs.* Sumck, 49 Ind. 302.
Menzell *vs.* R.R. Co., 1 Dill. 531.
Edsall *vs.* Camden, &c., R.R. Co., 50 N. Y. 661.

Broom in his "Legal Maxims," p. 596 (7th Amer. Ed.), on this point says:

"In like manner with respect to contracts not under seal, the generally received doctrine of law undoubtedly is that the party who *makes* any instrument should take care so to express the amount of his own liability, as that he may not be bound further than it was his intention that he should be bound, and on the other hand, that the party who receives the instrument and parts with his goods on the faith of it, should rather have a construction put upon it in his favor, *because the words of the* instrument are not his *but those of the other party.*"

Lee *vs.* Dick, 10 Pet. 482.
Mauran *vs.* Bullas, 16 Pet. 528.

The practical interpretation of contract is of very great importance; as was said by Mr. Justice Swayne in

Insurance Co. *vs.* Dutcher, 95 U. S. 273.

"The construction of a contract is as much a part of it as anything else. There is no surer way of finding out what parties meant than to see what they have done."

And see

Dist. of Columbia *vs.* Gallaher, 129 U. S. 505.
Nash *vs.* Towne, 5 Wall. 689.

"Courts in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances; and may avail themselves of the same light which the parties enjoyed when the contract was executed. They are, accordingly, entitled to place themselves in the same situation as the parties who made the contract in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described."

It is plain, therefore, that the unqualified instruction, asked for by plaintiff in error (fol. 106), that the jury should disregard all the oral evidence in the case to modify the transaction as represented by the order and receipt, was properly refused by the learned trial judge.

The fourth request was that Martin, Turner & Company, acceptors of the bill falling due on the 29th of February, 1884, were primarily liable for its payment and liable to the holder, whether put in funds by the drawer or not; and, being so liable, the money remitted by the plaintiff became their money as soon as it came under their control and then ceased to be his. Whether or not Martin, Turner & Co., as acceptors of the bill, were primarily liable for its payment and liable to the holder, is immaterial to the discussion of the questions of law involved in this case. The proposition asked would have been correct if it had read that upon the plaintiff in error paying the money at Glasgow by mail, in accordance with the plaintiff's instructions, it would have freed the plaintiff in error from liability; but, as expressed, the request is directly at variance

with the authorities cited under the first and second points, and on which this action is maintained.

An exception is claimed at the end of the charge (fol. 116, p. 53), but it is so mingled with a request that was charged that it cannot well be considered; and, in any event, it only amounts to a request to take the case from the jury, and this claim of the plaintiff in error has been fully argued.

SEVENTH POINT.

The use of the word "Glasgow" as the address, was a material part of the contract.

That the owner of the money remitting it for a specific purpose, with which fact he acquainted the bank, was entitled to direct where it should be paid, is respectfully asserted on his behalf. He testifies on cross-examination that he had an object in it, whatever his object may have been, whether wise or unwise, calculated to protect or not to protect his interests, the plaintiff in error contracting with him on such terms was bound to carry them out. That loss followed the deviation has been plainly shown. But the rule we have contended for is applied even where loss is not shown. Thus, for example, in Filley *vs.* Pope, 115 U. S. 213, it was held that under a contract for the sale of pig iron, to be shipped from Glasgow as soon as possible, that the shipment from Glasgow was a material part of the contract, that the buyer could refuse to accept iron shipped from Leith, though it arrived earlier than it would have arrived by any ship that could have been obtained from Glasgow, and although the iron was mined at the same point it would have been mined at if

shipped from Glasgow; and the Court, in citing illustrations to sustain the view taken, say:

"If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again: the buyer would have an insurable interest in the iron during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. But a policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith."

So in this case Cooper could not have complained had the money been paid to Martin, Turner & Co. at Glasgow. If it was paid to them there he may have assumed that they would use the specific remittance for the specific purpose for which it was sent, while if paid to their credit at the Bank of Scotland, it of necessity at once became mingled with their general fund.

EIGHTH POINT.

The argument of the plaintiff in error, that the bill, to retire which this money was remitted, was payable in London, having been accepted by Martin, Turner & Co., and made payable at the Bank of Scotland, merely raises a question for the consideration of the jury with the other evidence in the case; but Cooper claimed, and the jury found his claim to be true, that, with knowledge of the fact that the bill was payable somewhere in London, he contracted that his check should go through the mail up to Glasgow. And he may well have intended that the specific check should go back again to London to be used to take up the draft, not desiring or intending that it should be mingled with Martin, Turner & Co.'s funds. While the fact that the bill of exchange was payable in London was thus urged

to indicate that Mr. Cooper did not intend this money should be sent to Glasgow, yet he testified to the contrary, the record evidence largely sustained him, and the jury found in his favor.

LAST POINT.

It is respectfully submitted that the judgment should be affirmed.

JOHN M. BOWERS,
Of Counsel for Defendant in Error.

137-480

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IN THE

Supreme Court of the United States.

October Term, 1890. No. 1383.

DANIEL G. AMBLER AND JAMES P. TALIAFERRO, DOING BUSINESS UNDER THE NAME AND STYLE OF AMBLER & TALIAFERRO, Plaintiffs in Error,

vs.

ISAAC EPPINGER, Defendant in Error.

} Error to the Circuit Court of the United States for the Northern District of Florida.

This Writ of Error is brought under the Act of February 25, 1889 (S. L. 693), to review the Decision of the Circuit Court as to its Jurisdiction.

STATEMENT OF CASE.

On the 23d of December, 1887, the defendant in error brought his action in the Circuit Court for the Northern District of Florida against the plaintiffs in error. So much of the record as is necessary to the proper understanding of this case is printed below:

United States Circuit Court.

Fifth Circuit, Northern District of Florida.

The President of the United States to the Marshal of the Northern District of Florida, greeting:

You are hereby commanded to summon Daniel G. Ambler and James P. Taliaferro, doing business under the name style firm of Ambler & Taliaferro, citizens of the state of Florida, if they be found in your District, to be and appear before the Circuit Court of the United States, Fifth Circuit and Northern District of Florida, at the rule day of said Court, to be held at the clerk's office, in the city of Jacksonville, on the first Monday of January next, to answer unto Isaac Eppinger, who is a citizen of the State of New York, in his own right and as assignee of John K. Russell in said Court on a plea of trespass, wherein the plaintiff claims damages to the amount of six thousand dollars.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States and the seal of this Court, at the city of Jacksonville, in said District, this 23d day of December, A. D. 1887.

PHILIP WALTER.
Clerk.

H. BISBEE, Esq.,
Plaintiff's Attorney.

DECLARATION.

In the Circuit Court of the United States,
Northern District of Florida.

Isaac Eppinger, who is a citizen of the State of New York, plaintiff, in his own right and as the Assignee of John K. Russell, by H. Bisbee, his attorney, complains of Daniel G. Ambler, and James P. Taliaferro, co-partners doing business under the name and style of Ambler & Taliaferro, defendants, who are citizens of the State of Florida.

For that whereas, heretofore, to wit, in the years of 1885, 1886, and 1887, the defendants, wrongfully, wilfully, and maliciously entered upon, cut down upon and carried away from the lands of the plaintiff and the said John K. Russell, that is to say, sections twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), township two (2), south of Range nineteen (19), east of the Tallahassee meridian, in the Northern District of Florida, three thousand (3,000) pine trees and pine logs of the value of six thousand dollars ($6,000); and then they appropriated the said trees and logs to their, defendants' own use, and deprived the said plaintiff and the said John K. Russell of the use of the same. That afterwards, to wit, in the month of November, 1887, the said John K. Russell for valuable consideration sold, assigned, released, and transferred to the plaintiff, all his right, title and interest in, to and of the said pine trees and logs, so as aforesaid cut, carried away and appropriated to defendants' use, and all his right, title, and interest in the claim and demand against the said defendants for the value of the said pine trees and logs, and for other damages and injuries to the said lands caused, committed and done thereon by the said defendants. That the defendants have neglected and refused to pay the plaintiff the value of the said pine trees and timber and the damages aforesaid though often requested so to do. Wherefore plaintiff brings this suit.

Second. For that whereas, heretofore, to wit: In the years of 1885, 1886 and 1887, the defendants wrongfully, wilfully and maliciously, entered upon, cut down and destroyed upon the lands of the plaintiff and the said John K. Russell—that is to say, sections twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), township two (2), south of range nineteen (19), east of the Tallahassee meridian, in the

Northern District of Florida, certain other pine trees and logs of the value of two thousand dollars ($2,000); and other injuries and waste upon and to the said described lands; and the said defendants did then and there do, and commit, to the great wrong and injury of the said plaintiff and the said John K. Russell. That afterwards, to wit: In the month of November, A. D. 1887, the said John K. Russell for valuable consideration sold, assigned, released and transferred to the plaintiff, all his right, title and interest in and to the claim and demand against the defendants, for the value of the said pine trees and logs destroyed as aforesaid by the said defendants, and for other waste and injuries by the said defendants so as aforesaid done and committed on the said described lands by the said defendants; and that the said defendants have neglected and refused to pay the plaintiff his just and reasonable damages sustained by the destruction of the said trees and pine logs, and the said other injuries and wrongs done and committed by the said defendants on the said described lands, though often requested so to do. Wherefore plaintiff brings this suit.

Third: For that whereas, heretofore, to wit: In the year 1887, the said defendants wrongly and maliciously entered upon the lands of the said plaintiff and the said John K. Russell, to wit: upon the northeast quarter (¼) of the northeast quarter (¼) section twenty-four (24), township two (2), south of range nineteen (19), east of the Tallahassee meridian, and upon the said lands above described the said defendant wrongfully, unlawfully, and maliciously built and constructed, and caused, and procured to be unlawfully and maliciously built and constructed, a certain railroad; and the said defendants unlawfully and wrongfully and maliciously use and continue to use and unlawfully and wrongfully cause and procure others to use the said railroad, by the running of trains of cars thereon, to the great

damage of the plaintiff and the said John K. Russell the owners of the said land. That afterwards, to wit: in the month of November, 1887, the said John K. Russell for a valuable consideration sold, assigned, released and transferred to the plaintiff, all his right, title and interest in and to the demand and claim of the said John K. Russell against the said defendants, for the damages, injuries and wrongs done and committed by the said defendants on the said lands by the construction and building of the said railroad thereon, and running trains of cars thereon. That the said defendants have neglected and refused to pay to the plaintiff just and reasonable damages for the said wrongs and injuries though often requested so to do. Wherefore plaintiff brings this suit.

Fourth. For that whereas, heretofore, to wit: In the years 1885, 1886 and 1887, the said defendants wrongfully and wilfully entered upon, and cut down upon, and carried away from the lands of the said plaintiff and the said John K. Russell, and wrongfully, wilfully and maliciously caused and procured other persons to enter upon, cut down upon and carry away from the said lands of the plaintiff and John K. Russell—that is to say, sections twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26) and twenty-seven (27), township two (2), south of range nineteen (19), east of the Tallahassee meridian, in the Northern District of Florida, three thousand (3,000) pine trees and logs of the value of six thousand dollars ($6,000), which the said defendants then and there appropriated to their own use and deprived the plaintiff and the said John K. Russell of the use of the same. And also in the years aforesaid, upon the said described lands of the said plaintiff and the said John K. Russell, the said defendants wrongfully and wilfully cut down, destroyed and left upon the said lands, and wrongfully and wilfully caused and procured other persons to cut down, destroy and leave upon the said lands

certain other pine trees and logs, to wit: Two thousand (2,000) pine trees and logs of the value of one thousand dollars ($1,000). And in the year 1887 upon and across and over the northeast quarter (¼) of the northeast quarter (¼) of section twenty-four (24), township two (2), south of range nineteen (19) east, the same being the lands and property of the said plaintiff and the said John K. Russell, the said defendants wrongfully and wilfully built and constructed, and wrongfully and wilfully caused and procured other persons to build and construct a railroad, and wrongfully and wilfully run, and caused and procured to be run and operated by other persons, engines and cars upon the said railroad, so as aforesaid built and constructed, to the great damage, wrong and injury of the said plaintiff and the said John K. Russell. That afterwards, to wit: In the month of November, A. D. 1887, the said John K. Russell, for valuable consideration, sold, assigned, released and transferred to the plaintiff all his right, title and interest in the said pine trees and logs, so as aforesaid cut down, carried away and appropriated to the defendants' use, and destroyed and left upon the said lands as aforesaid, and all his right, title and interest in the claim and a demand of the said John K. Russell against the said defendants for the value of the said pine trees and logs, and for the damages, injuries and wrongs to the said lands, done and committed thereon by the said defendants, and caused and procured to be done and committed thereon by other persons, and for damages, wrongs and injuries sustained by the said John K. Russell, by the construction and building of the said railroad over the said northeast quarter (¼) of the northeast quarter (¼) of section twenty-four (24), township two (2), south of range nineteen (19), east of the Tallahassee meridian, and for running engines and trains of cars over the said railroad, so constructed as aforesaid, and causing other persons to

run engines and trains of cars thereon; and the said defendants have not paid the plaintiff just and reasonable value of the said pine trees and logs and for the said other damages, injuries and wrongs as aforesaid, though often requested so to do, to the plaintiff's damage of six thousand dollars ($6,000). Wherefore he brings this suit.

In the Circuit Court of the United States for the Northern District of Florida.

ISAAC EPPINGER
vs.
AMBLER & TALIAFERRO.

Now come the defendants by Fleming & Daniel, his attorneys, and says that the declaration is bad in substance and for grounds of demurrer says:

1st. That it appears by the said declaration that at the time of the alleged grievances complained of the said lands described in the declaration were owned jointly by the plaintiff and the said John K. Russell.

2d. That it appears by the said declaration that the said John K. Russell is a necessary party plaintiff to this action.

3d. Because the said pretended right of action is not the subject of assignment.

4th. Because the said John K. Russell could not assign his interest in the said pine trees and logs after a conversion thereof by the said defendants as alleged in the declaration.

5th. Because the said declaration is vague and uncertain as to the time of the commission of the acts complained of.

FLEMING & DANIEL.
Defendant's Attorneys.

The demurrer was overruled.

The defendants pleaded and issue was joined.

The defendants then, by their attorneys, Messrs A. W. Cockrell & Son, moved the Court to dismiss the suit upon the ground that "this Court, as shown by plaintiff's declaration, has no jurisdiction thereof."

This motion was denied. A verdict for $1,100 was rendered in favor of the plaintiff below.

After verdict, and before judgment, a motion was made to arrest the judgment on the ground that the record did not show that the Court had jurisdiction. This motion was denied.

Judgment was entered for the plaintiff below on the 31st of January, 1890, for $1,100, with interest at 8 per cent. from the date of the verdict, together with costs.

To reverse this judgment the present writ of error was sued out under the act of February, 1889.

The record shows nothing whatever as to the citizenship of John K. Russell, the assignor, through whose assignment the defendant in error claims.

Assignment of Errors.

Now come the plaintiffs in error by James Lowndes, their attorney, and say that the Circuit Court erred in deciding that it had jurisdiction of the above cause.

BRIEF.

The question for determination is whether the Circuit Court has jurisdiction of an action brought by the assignee of a claim of damages for tort on such assigned claim, when the record shows nothing as to the citizenship of the assignor of the claim.

That the plaintiff below sued as assignee appears from the declaration, in which he styles himself assignee,

and in each count of which he avers an assignment. The damage alleged was done to lands owned by the plaintiff below and John K. Russell. The suit was for the whole damage, and the verdict was in respect of the whole damage. The claim for the whole damage, however, was originally vested in Eppinger and John K. Russell, and Eppinger could not show title to it (*i. e.* the whole claim), except through the assignment of John K. Russell. It is therefore averred in his declaration and the averment was necessary.

But the Circuit Court has not jurisdiction of a suit or a claim like this, by an assignee, unless his assignor could have brought suit upon it. This seems clearly to be the intention of the act of March 3, 1887, which regulated the jurisdiction of the Circuit Court when this action was brought. It enacted as follows:

"That the Circuit Courts of the United States shall have original cognizance * * * of all suits of a civil nature, at common law or equity * * * in which there shall be a controversy between citizens of different States; * * * nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder of (*if*) such instrument be payable to bearer and be not made by any corporation unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made."

The statute thus in express terms excepts from the jurisdiction conferred, suits by an assignee on a chose in action unless the assignee could have brought suit upon it.

It is not necessary to argue that a claim or mere right of action for damages arising out of a tort is "a chose in action," and the only answer to the contention of the plaintiff in error which can be suggested is, that the words of the statute are not to be taken in their natural sense,

but are to be restricted to mean chose in action arising from contract. This latter view cannot be sustained either by authority or on principle.

In the case of Van Bokkelen *v.* Cook, 5 Sawyer, 587, the Circuit Court (Field, Sawyer and Hillyer, Justices) expressed the opinion that the words "chose in action" in the 11th section of the Judiciary act of 1789 embraced claims arising out of tort. There is no difference, as respects this question, between the language of the acts of 1789 and 1887.

The view of the statute taken by the defendant, in error violates the principle that, where the language of a statute is plain, there is no room for construction. The meaning suggested would be widely different from the plain meaning of the statute. The effect would be to give the Circuit Court a larger jurisdiction than that which they would have if the language of the statute is taken in its plain sense. The words "other chose in action" are the appropriate technical words to express claims arising on both tort and contract.

The exception of "foreign bill of exchange" from the exception to the grant of jurisdiction furnishes aid in the construction of the statute. It is obviously a limitation upon the words "other chose in action." Placed in their natural order the statute would read, "nor shall any Circuit Court or District Court have cognizance of any suit to recover the contents of any promissory note or other chose in action, except upon foreign bills of exchange." The principle of construction, "*expressio unius, exclusio alterius*," therefore, applies and aids the view here taken.

The history of the legislation on this subject strengthens the contention of the plaintiffs in error.

The act which before the passage of the act of March 3, 1887, regulated the jurisdiction of the Circuit Court was that of March 3, 1875. The former act was passed

to amend the latter. The act of 1875 contained this restriction on the jurisdiction conferred:

"Nor shall any Circuit Court have cognizance of any suit founded *on contract* in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." (18 S. L., 470.)

The exception in the act of 1875 was only of certain "contracts." It denied to the Circuit Court jurisdiction of all suits by an assignee on contracts other than promissory notes and bills of exchange.

The language of the act of 1887 is in striking contrast to this. Jurisdiction is taken away in suits on promissory notes, and on "other chose in action."

The mere fact that one act is a substitute for another furnishes a presumption that the intent of the later act differs from that of the first. Where the language of the later act differs from that of the first, this presumption is stronger:

"Where language is changed in a special enactment not part of a revision it indicates a change of intent, and calls for a change of construction."

Rich v. *Keyser, 54 Penn. St., 56.*

The act of 1887 restricted the jurisdiction given to the Circuit Court by the act of 1875 in two particulars (in addition to the one now under consideration): First, in changing the jurisdictional amount to $2,000; second, in taking away jurisdiction over promissory notes. The general policy may be said to be that of diminishing jurisdiction, and the plaintiff in error's construction of the statute accords with that policy.

Furthermore, the construction contended for by the plaintiff in error is in harmony with the policy of Con-

gress on this subject, as it has been declared by this Court.

In Bushnell *v.* Kennedy, 9 Wall., 387, Chief Justice Chase said:

"It was obvious that numerous suits, by assignees, under assignments made for the express purpose of giving jurisdiction, would be brought in those Courts if the right of assignees to sue was left unrestricted. It was to prevent that evil, and to keep the jurisdiction of the National Courts within just limits that the restriction was put into the act."

This view has the sanction of Chief Justice Marshall, who, in the case of the Bank of the United States *v.* The Planters Bank of Georgia, 9 Wheat., 904 (1824), used this language:

"It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in a Federal Court."

The assignment set up in this case is as much within the mischief intended (as is here said) to be remedied by the statute as the assignment of a *chose in action arising ex contractu*.

The only doubt which can arise upon the construction of the statute results from the words, "to recover the said contents." It may be argued that these words furnish an implication that the "chose in action" spoken of is one of which the word "contents" is predicable, and that this word is applicable only to choses in action arising on contract.

To this it may be answered that—

1st. There is nothing in common usage which makes it necessary to restrict the word "contents" to contracts. It signifies a sum of money, and a claim for damages

may have contents as well as a claim arising from contract. The word is the only appropriate one which could be used to signify the possible proceeds of claims generally.

2d. This Court has held that the word "contents" cannot be restricted to a sum of money recoverable under a contract, and that it embraces the right to recover specifically a parcel of land.

Corbin v. *Black Hawk, 105 U. S., 659.*
Shoecraft v. *Bloxham, 124 U. S., 730.*

So it has been held that a suit to recover damages for a refusal to accept and pay for merchandise purchased under an oral agreement is a suit to recover the contents of a chose in action.

Simons v. *Paper Co., 33 Fed. Rep., 19.*

If this reasoning is correct, the Circuit Court has not jurisdiction of a suit by the assignee of a claim arising from tort unless his assignor could have brought the suit.

It follows that in the present case the jurisdiction of the Circuit Court depended on the right of John K. Russell, the assignor, to bring the case in that Court. In as much as this right was based on his citizenship, his proper citizenship was a jurisdictional fact in the case.

It is also true that the burthen is upon the plaintiff in a suit in a Circuit Court of showing the necessary jurisdictional facts. They must appear affirmatively on the record. This is so as regards the citizenship of an assignor.

Metcalf *v.* Watertown, 128 U. S., 586.
Broch *v.* Northwestern Company, 130 U. S., 341.

The citizenship of John K. Russell, the assignor, being a jurisdictional fact, should have been shown in

some way by the record in this case. The record being entirely silent in regard to it, the Court had not jurisdiction over the case.

The objection to the jurisdiction may be taken at any time. (Morris *v.* Gilmer, 129 U. S., 315.) In this case it was expressly taken by the motions to dismiss, and it is also apparent upon the face of the record.

It is submitted that the judgment should be reversed and the verdict set aside, and the Circuit Court directed to enter a judgment that it will not and ought not to take cognizance of the action.

JAMES LOWNDES,
Attorney for Plaintiffs in Error.

Supreme Court U.S.
FILED.
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JAMES H. McKENNEY,

SUPREME COURT, UNITED STATES.

OCTOBER TERM, A. D. 1890.

AMBLER & TALIAFERRO,
Plaintiffs in Error,
vs.
ISAAC EPPINGER,
Defendant in Error.

No. 1383.

BRIEF OF DEFENDANT IN ERROR.

Attention is called to the fact that there is no assignment of errors in the transcript of the record. Without waiving any benefit arising from this defect, the defendant in error submits his case on brief.

The cause of action stated in the several counts in the declaration is the cutting and conversion of pine logs and damages to the realty.

After issue joined upon pleas treated as a plea of not guilty, the plaintiffs in error, defendants in the court below, moved to dismiss the action upon the ground that "this court, as shown by *ptaintiff's declaration*, has no jurisdiction thereof." This motion was denied.

The error assigned (in the brief of plaintiff in error) is, in effect, that the court erred, in denying the motion to dismiss, for want of jurisdiction apparent on the declaration.

ARGUMENT.

When the motion to dismiss was made, issues of fact had been joined upon the merits.

The declaration discloses that the plaintiff below was a citizen of New York, and the defendants were citizens of Florida. It also discloses that the plaintiff sued upon two causes of action,

to-wit: on his own claim *and on a claim as assignee* of John K. Russell.

The declaration alleges that defendant cut down and carried away logs *"from the lands of the plaintiff and the said John K. Russell."*

It is not stated, or shown, anywhere in the record, whether the plaintiff and Russell were tenants in common, joint tenants, coparcenors or copartners. Consistently with the averments in the declaration they could have been either.

For all that appears in the record, the proof at the trial may have established that the plaintiff was the sole owner of the lands in question, and that the assignment was surplusage, and no proof of it necessary. All reasonable inferences and presumptions will be made to support the judgment.

Counsel for plaintiff in error treat the action as brought by the plaintiff below exclusively upon his claim as assignee, and then argues that the court has not jurisdiction, because it is not shown that his assignor could have maintained a suit on the claim assigned if no assignment had been made.

The right of the plaintiff below to prosecute the action to assert his claim distinct from that as assignee is entirely ignored. That plaintiff below had the right to maintain the action in his own name and in virtue of his individual interest, as a co-owner in the property, clearly appears from the declaration. Joining with that right a claim as assignee, did not defeat and could not defeat his right to recover, even though his *claim as assignee* could not be maintained, for defect in evidence or because his assignor could not have sued on his part of the claim.

The record shows that at the time the motion to dismiss was made no plea in abatement for the non-joinder of Russell had been interposed. Nor had the objection that Russell could not have maintained a suit in his own name been made in any form. But independent of the assignment he had a cause of action. Whether he and Russell were tenants in common or copartners, the plaintiff had the right to recover his share of the damages and, there being no plea in abatement for non-join[illegible] he, the plaintiff, had the right to recover the entire damages.

It is well settled that in actions of *trover and trespass* one ten-

ant in common may maintain a suit; and defendant may give in evidence the joint interest in others in mitigation of damages. But he cannot avail himself of the omission of the plaintiff to unite the other tenants in common with him, otherwise than by a plea in abatement.

Freeman on Cotenancy and Partition, 2d edition, section 353, and the authorities there cited.

Gobriskie vs. Smith, 13 New York, 337.

It cannot be determined from the record what interest or estate Russell had in the lands. His interest may have been one-half or one-tenth, or none at all.

And in case of joint tenants one may recover the damages sustained by all in the absence of a plea in abatement.

Gobriskie vs. Smith, 13 New York, 337, 338.

And in some States it has been held that each co-tenant may maintain a separate action of tort against a third person who has converted any personal property of the co-tenancy, and that a plea in abatement would not avail.

Thornburg vs. Morehead, 5 Brewster, 92.
Boobier vs. Boobier, 39 Me., 409.
Howard vs. Snelling, 28 Ga., 473.
16 Fed. Rep., 178.

There is, then, in the declaration a good cause of action in the plaintiff not arising from the assignment, and the damages stated in the declaration exceed the jurisdictional amount, and would exceed that amount if reduced one-half. Clearly the court had jurisdiction of the parties and *this cause of action.*

Howdin vs. Cass county, vol. 42; Fed. Rep., p. 652-657; 106 U. S., p. 640.

"A tenant in common, who is a citizen of another State, may sue in the Circuit Court for his portion, although his co-tenants who are citizens of the State where the lands are cannot maintain such a suit."

Brown's Lessee vs. Browne, 1 Washington C. C. Rep., 429.

"Where a plea of non-joinder is interposed and it appears that the parties omitted are not inhabitants of the Federal District and do not voluntarily appear, the plea will be overruled."

Gray vs. National Steamship Co., 7 Rep., 581; also reported in 19 Blatchford, 216.

By the ancient common law, requiring a joinder of co-tenants, the rule was dispensed with in cases where there was a substantial reason for non-joinder.

Here the assumed reason of non-joinder was that Russell was a citizen of Florida and joining him as a plaintiff would have defeated jurisdiction.

PLEA IN ABATEMENT.

The rule of common law was that the objection of non-joinder could only be taken by plea in abatement. Such is the rule now unless changed by statute. The rule has not been changed in Florida by statute, but is expressly recognized by statute.

McClellan's Digest Laws of Florida, p. 828, sec. 69.

The point here made and emphasized is: that a cause of action, over which the court had jurisdiction, distinctly appears in the declaration *apart and distinct* from the claim as assignee.

Regard the averment of assignment as surplusage, or assume the court instructed the jury that the plaintiff could not recover on his claim as assignee [for the reason it is not shown the assignor could have sued], there still remains an action, and a cause of action within the jurisdiction of the court which justified the verdict and the judgment.

116 U. S. Rep., 550-599.

In this view of the case the jurisdiction was clear, the judgment is correct and should be affirmed.

A motion to dismiss was not the remedy. As to *claim* as assignee the proper remedy was to move to strike out the alleged assignment or instructions to jury that the court did not have jurisdiction of *that* claim.

The only way to defeat recovery of plaintiff on his claim arising from his part ownership of the property trespassed upon

was a plea in abatement, though we contend in this case, and like cases in the Federal Court, such plea should not be sustained, because a joinder would defeat jurisdiction.

If correct in these views the question of whether or not the assignment is within the prohibition of the act of March 3d, 1887, need not be considered.

But our contention in respect to this assignment is, that it does not come within the true sense and meaning of the statute. It is not a suit to recover *the contents of any chose in action.* The mentioning of *"such instrument"* shows that a claim for damages to real or personal property, or the recovery of personal property, was not in the mind of the legislators who enacted the law. The language of the act of 1887 in this particular respect is precisely the language of section 629 of the Revised Statutes.

This court has repeatedly decided that the words, "other chose in action" were designed to embrace the *rights a contract or instrument* conferred which were capable of enforcement by suit.

Shoecroft vs. Bloxham, 124 U. S., 730-735.
Corbin vs. County of Black Hawk, 105 U. S., 659-666-667.
Deshler vs. Dodge, 16 How., 622-631.

It has also been repeatedly held that a suit by an assignee of a claim for damages for a tort to property or to recover personal property, or its value, is not within the statute.

Barney vs. Globe Bank, 5 Blatchf., 107, 114, 115.
Van Bokkelen vs. Cook, 5 Sawyer, 587-591.
McNichol vs. Phelps, 16 Fed. Rep., 8.
Deshler vs. Dodge, 16 How., 622.
Bushnell vs. Kennerly, 9 Wall., 387-391.

In the case in 5 Sawyer, *supra*, the court suggested that by using the word "contract" in the act of 1875 the prohibition was restricted to assignment of rights arising from a contract. But this court before the date of that decision, and since, and since the act of 1875, has ruled that the words "other chose in

action" were restricted to *contracts* and did not embrace a claim for a tort, etc.

The prohibition of jurisdictlon in the act of Congress *is a restriction or limitation on a general grant of jurisdiction*, and therefore the clause containing such prohibition must, upon settled rules of construction, be strictly construed and cannot be held to embrace causes of action not clearly within the meaning of the words employed. And such has been the construction of the statute by this court, as we understand it.

In support of the position of plaintiff in error Simons vs. Ypsilanti Paper Co., 33 Fed. Rep., 193-195, is cited.

But this case does not support his contention. The point in the case was whether the statute included *an "oral contract,"* and the court held it did, and recognizes the rule that it does not include a claim for a tort.

Nor is there anything in the cases of Newgoss, Stewart, Garrity vs. City of New Orleans, 33 Fed. R., 196, to support contention of plaintiff in error. In each of these cases *a written instrument* was sued on.

The question of right of an assignee of a claim for tort to maintain a suit was not involved or mentioned in the opinion of the court.

The conversion of the logs cut and removed did not change the title to them. The title was still in Eppinger & Russell. There is no reason why Russell could not sell and transfer his title or interest in the logs and in the claim to damages, precisely the same as he could sell and transfer his title and interest to any real or personal property. The sale being *bona fide* (in this case there is no pretence, it was colorable), the vendee or assignee being a citizen of New York has the right to invoke the jurisdiction of the Federal Court in a suit against a citizen of Florida. The effect of this assignment is to release to plaintiff any claim to any moneys recovered by the suit and does not enlarge or diminish his right to recover. It is evident from the record that Russell could not now maintain a suit against defendants in any court, for he has assigned his claim. Defendants cannot be again vexed by a suit from him; and such liability to a second suit was the only reason at common law for the joinder

of tenants in common in such action. Therefore defendants have no cause to complain of the assignment. It appears they have been benefited by it.

Defendants below first met the plaintiff with a demurrer to his declaration (p. 7 of brief of plaintiff in error), which was overruled.

No question of jurisdiction was raised by the demurrer. One question raised by it was the assignability of Russell's claim. That is not open for discussion here, jurisdiction being the only one involved.

The other question attempted to be raised by the demurrer was non-joinder of Russell. But that could not be raised by demurrer.

H. BISBEE,
for Defendant in Error.

Office Supreme Court U. S.
FILED.
NOV 29 1890
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IN THE

Supreme Court of the United States.

No. 1383. October Term, 1890.

DANIEL G. AMBLER AND JAMES P. TALIAFERRO,
DOING BUSINESS UNDER THE NAME AND STYLE OF
AMBLER & TALIAFERRO,
PLAINTIFFS IN ERROR,

vs.

ISAAC EPPINGER, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Northern District of Florida.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

Two answers are made to the argument of the plaintiffs in error:

I. That the defendant in error, the plaintiff below, sued not as assignee, but in his own right.

II. That the Circuit Court has jurisdiction of suits by assignees of damages for torts.

I. This action was brought by Eppinger, as assignee.

It is argued by the defendant in error that the cause

NOV 29 1890

of action is not an assigned cause of action but a cause of action originally vested in Eppinger. Several views of the cause of action are suggested.

1. It is said that Eppinger sued in respect of the injury to his interest.

2. That he sued as sole owner of the land.

Both of these contentions are contradicted by the record.

3. It is argued that the allegation of an assignment is surplusage and that Eppinger as co-tenant was entitled, "*suo jure*," to recover the entire damages.

But one co-tenant is not entitled to recover the damages done to the whole estate.

"The rule of law upon this subject best sustained by the authorities, both English and American, is this, that although the form of action be such that all the co-tenants ought to join, yet if the action be for the conversion of, or inquiries to, the common property, and if one 'sue alone, and the defendant, instead of pleading the nonjoinder in abatement, plead to the action, the plaintiff will recover for his share of the damages.'"

Freeman on Co-tenancy, 2d ed., 353.

The only case relied on for the doctrine asserted by the defendant in error is Zabriskie *v.* Smith, 13 N. Y., 337.

This case stands by itself, is against the current of authority, and is thus criticised in a work of authority:

"Well, as this general rule is established, there are cases in which it has been sought to create exceptions to the rule; and in some of these cases some very novel propositions have been assumed to be familiar and long established."

Freeman on Co-tenancy, 356.

The present case is also distinguishable from Zabriskie *v.* Smith.

4. It is argued that there was a sale by Russell to Eppinger of his title in the logs cut, and that the suit is by Eppinger for injury to his property, viz., the logs.

But the third count is for *trespass on land*, and the argument does not apply to it.

In the other counts a *conversion* of the logs is alleged to have taken place while the title to them was in Eppinger and Russell, and the assignment is of a claim for damages. There was nothing else in Russell to assign. The action is not to recover possession, but damages.

There would be better ground for the contention on behalf of the plaintiffs in error that the assignment was of the proceeds of the conversion and that the action was on an implied contract to pay them. Such an action would clearly not be within the jurisdiction of the Circuit Court.

The action of which the Circuit Court took jurisdiction was one for the entire damage to the land brought by Eppinger as co-owner and as assignee of Russell.

II. The suit being that of an assignee, is one of which the Circuit Court did not have jurisdiction.

The case of Deshler *v.* Dodge, 16 How., 622, is not authority to the contrary.

In that case, Deshler brought replevin to recover from Dodge possession of certain bank notes. Dodge pleaded that the original owner of the notes, who could not sue in the United States Court, sold, assigned, and transferred them to Deshler, while in his (Dodge's) possession, and that the Court was without jurisdiction.

The Court held that a suit to recover the *possession of the bills* was not *a suit to recover the contents of a chose*